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Hand Delivered
Jefferson County Planning Commission
621 Sheridan Street
Port Townsend, WA 98368
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Re: Preliminary Draft SMP (December 3, 2008)

Dear Members of the Planning Commission:

I represent The Olympic Stewardship Foundation ("the OSF"). The OSF's membership includes a broad array of citizens, property owners and business owners in Jefferson County. The OSF is a non-profit organization dedicated to representing the voice of rural landowners who support the shared belief that citizens, particularly those who live on their land, are capable of providing the very best care and management for the environment in which they live. The core of the OSF's founding members have a demonstrated record of maintaining and improving on-the-ground conservation in Jefferson County. The January 14th edition of the Port Townsend and Jefferson County Leader featured a front page article on Roger Short's efforts to enhance habitat for the rare Trumpeter Swan on his 350 acre farm. The OSF supports balanced regulation of shoreline use and development.

As set out below, the OSF believes that the current draft of the revised Jefferson County Shoreline Master Program (SMP) is overly broad, conflicts with the general laws of the state, delegates too much local control to the Department of Ecology, is internally inconsistent and inconsistent with the Comprehensive Land Use plan, and violates the state law mandate to regulate shoreline areas exclusively under the Shoreline Management Act.

Contrary to public statements made by some County officials, the proposed Draft SMP regulates existing uses and relegates the built environment to a disfavored status. Specifically, imposition of the proposed 150 foot generic shoreline buffer would make all existing development within Shoreline Management Act jurisdiction in Jefferson County non-conforming, a highly disfavored treatment. The public should be informed by Jefferson County that the proposal as currently drafted is a huge expansion of the shoreline regulatory system, with severe consequences on shoreline property owners and users.

In the opinion of the OSF, the County Final Shoreline Inventory and Characterization Report (Revised) dated June 2008, is incomplete. It lacks both field verification and a thorough description and analysis of existing conditions since it is based only upon published and unpublished literature pertaining to Jefferson County. (Study, p. 1-18). This approach violates the State Guidelines for revision or adoption of a new SMP. WAC 173-26-201 (37)(c) requires actual specification of the extent of existing structures and development and the effectiveness of

the existing shoreline regulatory system in terms of preventing or minimizing impacts associated with shoreline development to date. The Study does not contain such specification.

The Study concedes it is "not intended as a full evaluation of the effectiveness of the SMA existing shoreline policies or regulations." (Study, p.1-3). The Characterization Report also states in 1.2, "While this report provides a basis for updating the policies and regulations contained in the County's SMP, it does not provide a complete blueprint for managing each individual shoreline parcel over time." Under the section for Mapping in 1.2.1, the Study further states that "this report makes no representation as to the exact ownership (public or private) of specific areas of the County shoreline or adjacent tidelands, except for noting the general location of public parks and other public access points." It is also stated in the Draft SMP that maps are for "informational purposes only."

The Cumulative Impacts Assessment is likewise flawed, since it fails to meaningfully evaluate the effectiveness of existing regulatory systems or evaluate current conditions. A key need is to use a process that "… identifies, inventories and ensures meaningful understanding of the current and potential ecological functions provided by affected shorelines." WAC 173-26-186(8)(a). The Impacts Assessment is lacking in this regard.

The State Guidelines for revisions of a SMP require a cumulative impact analysis, which includes such analysis, along with an evaluation of reasonably foreseeable future development:

> Local master programs shall evaluate and consider cumulative impacts of reasonably foreseeable future development on shoreline ecological functions and other shoreline functions fostered by the policy goals of the act . . . Evaluation of such cumulative impacts should consider: (i) Current circumstances affecting the shorelines and relevant natural processes; (ii) Reasonably foreseeable future development and use of the shoreline: and (iii) Beneficial effects of any established regulatory programs under the other local, state, and federal laws.

WAC 173-26-186(8)(d)

The OSF strongly opposes adoption of a new or revised SMP until Jefferson County complies with the State Guidelines and prepares a proper Shoreline Inventory and Cumulative Impacts Analysis. Sound regulatory choices cannot be made without this essential base information. The Jefferson County Comprehensive Plan ("the Plan") mandates use of good scientific information on which to base regulation of "shoreline land use activities." Plan, p. 8-24.

INTRODUCTION OF DENNIS REYNOLDS

Before proceeding to detailed comments, let me introduce myself. For 12 years, I was employed by the Washington State Office of Attorney General. In that capacity, I represented the

Departments of Fisheries and Game, and other state agencies, in discrete matters, mostly complex environmental cases heard by the State Shoreline Hearings Board, the Pollution Control Hearings Board, the Energy Facilities Site Evaluation Council and the Federal Energy Regulatory Commission. I drafted the State Hydraulic Code implementing regulations and helped draft the SEPA Guidelines.

I have been in private practice since 1985. I handled one of the first appeals to a Growth Management Hearings Board, *Berschauer v. Tumwater*, which established "urban infilling" requirements. In 1991 I helped draft the Pierce County Critical Areas Ordinance, representing the building industry. In 1992, I successfully challenged use of the Department of Ecology's Model Wetlands Ordinance for the Building Industry Association of Washington. I was one of two attorneys representing a coalition of clients who struck down the 2001 "SMA Rules" promulgated by the Department of Ecology to guide revisions and updates of local shoreline master programs. I helped draft the replacement guidelines, WAC Chapter 173-26, the State Guidelines for revision or adoption of new SMPs. I was lead counsel in *Biggers v. Bainbridge Island*, a case which struck down that City's illegal "rolling" shoreline moratoria. I was named by Washington CEO Magazine in June, 2008 as one of the top lawyers in two categories.

My current practice emphasizes shoreline regulatory and critical area matters. I routinely provide comment to local jurisdictions on proposed legislation, including revisions to critical area ordinances and shoreline master programs on behalf of a broad array of private clients. I currently serve as special counsel to Grant County on programmatic land use matters and related litigation and when needed have a similar position with Walla Walla County.

SUMMARY OF COMMENTS

Illegal Integration. Staff via integration of the existing Jefferson County Critical Areas Ordinance, JCC Chapter 18.22 ("the CAO") with the Draft SMP, proposes to essentially designate as "critical areas" all marine near shore areas, via use of extreme "No Development" buffers. This approach is illegal. It is also not supported by the record. As set out below, shoreline areas are exclusively regulated under the Shoreline Management Act ("SMA"), not under CAOs adopted pursuant to the Growth Management Act ("GMA"). Further, there is no showing in the record that all marine or shoreline areas in Jefferson County are "critical areas."

Overdesignation. The proposal to make all marine areas and associated uplands a "critical area" under the GMA is also over-inclusive and not supported by the record. Under relevant criteria enacted by the Washington Department of Community, Trade and Economic Development, not all near shore areas are "critical" fish and wildlife areas. Such areas must exhibit truly high functions and value for fish and wildlife to qualify for such a designation. This is not to say Jefferson County's marine shorelines are unimportant for marine species, but surely not all shorelines are "critical" areas. Over designation simply deflects attention from other needs, e.g., good shoreline planning on a site specific basis.

The Staff support for large marine buffers appears to be based upon the perceived need to protect and restore the shoreline. If so, this approach is overly broad and unsupported by the law. The Western Washington Growth Management Hearings Board has correctly observed that:

> All of the above quotes from the RCW and the WAC reflect an overall intent to assure no further degradation, no further negative impacts, no additional loss of functions or value of critical areas. Further, WAC 365-195-410(2)(b) focuses efforts on those natural areas that can be maintained; not on imposing burdens on farmers to retrofit or return natural conditions of habitat areas long since altered. "Critical areas should be designated and protected whenever the applicable natural conditions exist." … There is no mention in the definition to improve or enhance the structures, values and functions, only to 'preserve' them.

Swinomish Indian Tribal Community et al. Skagit County (WW6MHB Case No. 02-2-0012c), p. 1-22 (Dec. 8, 2003). At page 24, the Board states that "[W]e find that RCW 36.70(A).060(2) and .040(1) do not require buffers on every stretch of every watercourse containing or contributing to a watercourse bearing anadromous fish, to protect the existing functions and values of FWHCAs." Further, at page 26, the Board states that "we also find that the requirement to consider conservations and protection measures necessary to protect, or enhance anadromous fisheries does not mean that all these measures must be regulatory." The Draft SMP needs to be reconciled with the law in this regard.

Unsupported Presumptions Offered Under the Guise of "Science." Jefferson County was recently told by the Western Washington Growth Management Hearings Board that it must support blanket regulatory restrictions with actual science, not surmise:

> Of concern to the Board is Jefferson County's apparent requirement to retain vegetation regardless of the associated probability of risk which is not equal within the entire mapped CMZ, let alone on the entirety of properties only a portion of which are within a CMZ. That is, vegetation removal is not precluded only within the high risk area. Thus, should a property owner be prohibited from removing vegetation within a low risk area, or that portion of a property outside a CMZ where the probability of channel occupation is slight or nonexistent?
>
> The Board concludes OSF has carried its burden of proof in demonstrating that the County failed to comply with RCW 36.70A.172 (1) by not having BAS which supports the limitation of vegetation removal on the entirety of a parcel which includes property within a CMZ.

Citizens Protecting Critical Areas and Olympic Stewardship Foundation, et al. v. Jefferson County, WWGMHB Case No. 08-2-0029C, pp.38-39 (Final Decision, November 19, 2008).

The Existing Regulatory System is Working. The existing State Environmental Policy Act ("SEPA") review process and the permit system established under the current SMP, combined with State and Federal regulatory systems, adequately protect marine critical areas from harm. These regulatory programs are set out in the Comprehensive Land Use Plan, Table 8.2, pp. 8-3, 8-4. There is no analysis in the record that the existing regulatory system is inadequate, thereby requiring adoption of a new SMP over three times the length of the existing document. It is submitted the County should have confidence that its existing environmental review and permitting systems will prevent harm to the aquatic environment absent documentation to the contrary. These systems take away the need to impose generic regulatory measures, such as the proposed large shoreline buffers.

Generic Buffers And Set Asides Are Illegal. The Courts have struck down generic set asides, such as large buffer and native vegetation zones. The current approach which utilizes these regulatory devices will involve Jefferson County in needless litigation in which in my opinion it cannot prevail, distracting attention from the need to update the SMP. These generic devices should be discarded.

Illegal Forced Restoration. The staff approach is an unprecedented expansion of regulation under the SMA and derivatively the GMA, one not supported by the law or facts. This approach, if adopted, makes the extensively developed shoreline areas of Jefferson County non-conforming, especially Eastern Jefferson County, a status highly disfavored in the law as set out below. Since non-conforming uses must be phased out if discontinued or extensively damaged or destroyed, the result is mandated restoration of shoreline areas, even though the existing code and the law, as set in the *Swinomish Indian Tribe v Skagit County* case and other decisions, does not require "enhancement" or "restoration" of riparian areas.

Unique Local Circumstances. Jefferson County has unique local circumstances. Over 77% of Jefferson County's total land area is within Olympic National Park, Olympic National Forest and State Forestland. Comprehensive Plan, p. 3-1. There is a little private ownership or use of shorelines in the West End but 80% private ownership of shorelines in the East End. There shorelines "have value for residential and economic use." Plan, p. 8-5. Thus, preservation of shorelines in the East End with no meaningful new use or development allowed is not an option. These local circumstances must be considered. Plan, p. 3-2.

RECOMMENDATIONS

- Defer consideration of adoption of the revised SMP until completion of a more thorough Shoreline Inventory and Cumulative Impact Analysis which complies with the State Guidelines.

- Revise the Cumulative Impact Analysis to assess the effectiveness of the existing regulatory regime and to identify impacts reasonably foreseeable caused by allowed future development and use.

- Do not simply integrate the existing CAO into the new SMP. Use the SMA standards to decide the required level of protection for marine and shoreline areas.

- Retain the existing 30 foot setback for single-family residential found in JCC § 18.25.410(4)(J), but impose no new generic marine shoreline buffers.

- Establish marine buffers on a case-by-case basis for new commercial and industrial development, and large subdivisions, through the existing SEPA and SMA processes.

- Establish new performance standards for assessment of required buffers – if any – on a case-by-case basis.

- Do not designate or treat near shore marine areas as critical simply because of periodic juvenile salmonoid use during the March to June outmigration.

- Do not establish any buffers on already highly developed shorelines in urban areas, or in the alternative, explicitly exempt all new reconstruction and redevelopment, including change in uses and alteration of existing structures.

- Enact greater economic incentives for voluntary restoration of degraded shorelines

ILLEGAL INTEGRATION

1. Overview

At the outset, it appears that some background on the SMA and the GMA and the relationship of these two laws would be helpful. The Legislature enacted the SMA in 1971 to protect and manage the shorelines of Washington to foster all reasonable and appropriate uses, while protecting against adverse effects to public health, land, vegetation, wildlife, and the rights of navigation. RCW 90.58.020. The SMA has jurisdiction over all marine waters and shorelines 200 feet landward of the ordinary high water mark, both salt and fresh water. RCW 90.58.030(d).

The SMA requires that local governments develop master programs for the regulation and use of their shorelines. RCW 90.58.080. A "master program" is the "comprehensive use plan for a described area, and the use regulations together with maps, diagrams, charts, or other descriptive material and text, a statement of desired goals, and standards developed in accordance with the policies enunciated in RCW 90.58.020." RCW 90.58.030(3)(b). All master programs must be approved by the Washington State Department of Ecology. RCW 90.58.090. Once approved, the master programs "constitute [the] use regulations for the various shorelines of the state." RCW 90.58.100(1).

The GMA was enacted in 1990 to coordinate the State's future growth via comprehensive land use planning. *See* Laws of 1990, 1st Ex. Sess., ch. 17, *codified* at RCW 36.70A. As part of

this update process, the GMA requires cities and counties to designate "critical areas," to be protected through enactment of development standards and regulations. RCW 36.70A.060(2); RCW 36.70A.172(1). Critical areas are defined in the GMA to include "fish and wildlife habitat conservation areas." RCW 36.70A.030(5)(c). They include wetlands, aquifer recharge areas, hazardous slopes and frequently flooded areas. Comprehensive Plan, p. 8-4.

2. The SMA and GMA: Partial Integration

Turning in more detail to the regulatory schemes set up by the GMA and the SMA, in 1995 the Legislature partially integrated the SMA and the GMA, transferring jurisdiction for appeals of shoreline master programs to the Growth Management Hearings Boards. Laws of 1995, ch. 347, Section 311, *codified* at RCW 90.58.190. In addition, the goals and policies of the SMA were "added as one of the goals of this chapter [36.70A, the GMA]. RCW 36.70A.480 " With these changes, shoreline master program use regulations are now considered as part of a county's or city's development regulations. *See* RCW 36.70A.480(1). Other than consolidating "policies" which become part of the comprehensive land use plan, however, the integration of the SMA and the GMA did not go further, and the legislature retained regulation of shorelines exclusively under the SMA. *See* RCW 36.70A.480(3).

Most importantly, any amendments to a shoreline master program under the current system must occur under completely different procedures in terms of review and ultimate approval than those established for amendments to critical area ordinances. RCW 36.70A.480(2) in this regard provides:

> The shoreline master program **shall be** adopted pursuant to the procedures of chapter 90.58 RCW rather than the goals, policies, and procedures set forth in this chapter for the adoption of a comprehensive plan or development regulations.

(Emphasis supplied.)

Under the SMA, amendments to a shoreline master program are not effective until presented to the Department of Ecology for its review and approval. *See* RCW 90.58.080. This is a totally different process than that established for revisions adopted for a local government's critical areas ordinance. By contrast, CAO revisions become effective once they are approved by local municipality's legislative body, whether a board of county commissioners or a city council. Also, the provisions of RCW 36.70A.172, use of best available science, "shall not apply to the adoption or subsequent amendment of the local government shoreline master program and shall not be used to determine compliance of a local government's shoreline master program with chapter 90.58 RCW [the SMA] and applicable guidelines." *See* RCW 36.70A.480(3)(b).

Staff apparently presumes that regulation of marine areas is allowed under both the GMA and the SMA because a new SMP is to provide a level of protection "at least equal" to the level

of protection by the local government's CAO. However, as set out above, the GMA separates shoreline use regulation from critical areas regulation. Washington's shorelines may contain critical areas, but the shorelines are not critical areas simply because they are shorelines of state-wide significance. *See* Department of Ecology Directive, "Questions and Answers on ESHB 1993," p. 2.

What "at least equal to" means is that there be "no net loss" of shoreline processes, that is, that we do not go backwards in terms of protection. It does not mean "just use the CAO." The terms "at least equal" do not equate to a wholesale integration of a CAO. The goal of shoreline regulation is to prevent "net loss to shoreline ecological functions." *See* WAC 173-26-186(8)(6). As used in the State Guidelines, the terms "ecological functions" mean "…the work performed or role played by the physical, chemical and biological processes that contribute to the maintenance of the aquatic and terrestrial environments that constitute the shoreline's natural ecosystem." WAC 173-26-020(11). The functions of shorelines, especially marine areas and beaches, differ from upland critical areas. Also, all shorelines cannot be classified as "critical areas." These basic differences counsel against an uncritical integration. Simply put, the functions and values are less important than, for instance, protecting a key and irreplaceable aquifer recharge area. Integration of the CAO would be like protecting all upland areas as "critical areas," when they are not.

The only time that there is "integration" between the GMA and the SMA as to critical areas regulation is when a local government's master program does not include buffers required for protection of those critical areas that are located within shorelines of the state. *See* RCW 36.70A.480(6), which reads:

> If a local jurisdiction's master program does not include land necessary for buffers for critical areas that occur within shorelines of the state, as authorized by RCW 90.58.030(2)(f), then the local jurisdiction shall continue to regulate those critical areas and their required buffers pursuant to RCW 36.70A.060(2).

In Jefferson County, the Shoreline Master Program does include buffers, denominated setbacks. For instance, a 30 foot minimum is currently imposed for residential development. *See* JCC § 18.25.410(4)(J). Therefore, the SMA controls in all respects for the update of the existing SMP.

The Department of Ecology has issued a directive, found on the County's website, advising local municipalities that it is acceptable to regulate marine areas under a CAO until a SMP update is undertaken and approved, relying upon RCW 36.70A.480(3(a), which reads:

> As of the date the department of ecology approves a local government's shoreline master program adopted under applicable shoreline guidelines, the protection of critical areas as defined by

> RCW 36.70A.030(5) within shorelines of the state *shall be accomplished only through the local government's shoreline master program* and shall not be subject to the procedural and substantive requirements of this chapter, except as provided in subsection (6) of this section.

RCW 36.70A.480(3)(a).

This approach does not apply in Jefferson County. For one, the County has shoreline buffers via the minimum setbacks, so RCW 36.70A.480(6) preserves exclusive regulation under the SMA. Two, since the current CAO has not been approved by Ecology, it has no force or effect in terms of valid shoreline regulation. *See Evergreen Islands, Futurewise and Skagit Audubon Society v. City of Anacortes*, WW6MHB Use No. 05-2-0016, Final Decision and Order, December 27, 2005, p.31 (CAO provisions inapplicable to shoreline critical areas unless approved by Department of Ecology). Third, the matter of SMA/GMA is now settled by the courts, and the SMA trumps the GMA as to regulation of marine and shoreline areas. [1]

In *Biggers v. Bainbridge Island* , 162 Wn.2d 683, 169 p.3d 14(2007), the City of Bainbridge Island argued that provisions of the GMA applied to shoreline development, regardless of the SMA or the City's SMP. *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 866-67, 103 P.3d 244 (Div. 2, 2004). The Supreme Court disagreed, stating that the GMA clearly specifies that the SMA governs the unique criteria for shoreline development, and "[i]n other words, the SMA trumps the GMA in this area." *Id.*, 124 Wn. App. at 867. In fact, the *Biggers* court considered an argument that RCW 36.70A.480(3) was not added until 2003 and should only apply prospectively, and dismissed it stating that "this change does not affect our analysis." *Id*. at n.8. Thus, Ecology's interpretation relied upon by Bainbridge Island was rejected, but the Department for some reason has not issued any new directive.

In *Futurewise, et al. v. WWGMHB*, 162 Wn.2d 242, 244-45 (2008), the State Supreme Court unequivocally ruled that areas under SMA jurisdiction are exclusively regulated by that law, not the GMA. Thus, CAOs enacted under the GMA do not *carte blanche* apply to shoreline areas, so staff's mandated integration in the proposed Draft SMP is dead on arrival. The Western Washington Growth Management Hearing Board recently confirmed this point in a case involving Jefferson County:

> **Board Discussion**.
> The Board recognizes, based on the Supreme Court's recent holdings in

[1] The Washington Constitution provides that local police powers may not conflict with the general law of the state. *See* WASH. CONST. art. XI, § 11; *see also HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 482, 61 P.3d 1141 (2003); *Lenci v. City of Seattle*, 63 Wn.2d 664, 670, 388 P.2d 926 (1964). This rule is applicable to procedures found in the SMA. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 698, 169 P.3d 14 (2007). Thus, the staff proposed CAO integration is illegal.

> *Futurewise,et al. v. WWGMHB*, that there may be one exception to the GMA's rule requiring protection of critical areas – critical areas located within the jurisdiction of the SMA. The Court, in addressing the question of whether the Legislature intended the GMA to apply to critical areas in shorelines covered by the Shoreline Master Plan (SMP) until the Department of Ecology has approved a new or updated SMP, stated (Emphasis added).
>
> > [Citing ESHB 1933 (codified as RCW 36.70A.48)] "The legislature intends that critical areas within the jurisdiction of the [SMA] shall be governed by the [SMA] and that critical areas outside the jurisdiction of the [SMA] shall be governed by the [GMA]." We hold that the legislature meant what it said. **Critical areas within the jurisdiction of the SMA are governed only by the SMA**.
>
> The regulations at issue for OSF in this case relate primarily to the County's adoption of Channel Migration Zones (CMZs) for four of its most prominent rivers. The Board notes all of these rivers are within the jurisdiction of the SMA and therefore land located within 200 feet of either side of the rivers falls under the jurisdiction of the SMA. Therefore, despite the lack of a mandate and the pending motion for reconsideration, this Board will adhere to the Court's unambiguous holding that critical areas within the shoreline are regulated by the SMA.
>
> Thus, for the area of the CMZ that is within the 200 foot shoreline jurisdiction, the Board views the County's action effectively as a segment of its SMP update which is subject to review and approval by Ecology.

Citizens Protecting Critical Areas and Olympic Stewardship Foundation, et al. v. Jefferson County, WWGMHB Case No. 08-2-0029C, pp.16-17 (Final Decision, November 19, 2008).

3. Why It Is Important To Act Under The SMA.

I trust it is clear that Washington State has separate regulatory systems for critical areas located outside a shoreline jurisdiction, and areas within shoreline jurisdiction. This approach has a sound basis in the law and public policy and common sense. After all, uplands remote from shoreline and marine areas regulated under the GMA have different environments and uses. In addition, while upland uses can be sited in many areas, water dependent uses and development have no choice but to use the shorelines. Thus, the SMA and GMA provide legal standards that differ significantly in terms of whether or not proposed local ordinance revisions comport with state law. The GMA standard for determining consistency or validity of a local regulation promulgated as part of a CAO is essentially whether the adopted law "protects" critical areas.

See RCW 36.70A.060(2). The SMA standards are fundamentally different, since balanced choices must be made to allow development for water dependent and water related uses.

To expand on the last point, although the SMA does have strong policies relating to the protection and preservation of shoreline areas, the law allows "alterations" to the shoreline, especially for water dependent uses. Further, the law does not mandate shoreline enhancement and restoration [2] *See* RCW 90.58.020. The SMA also provides for permitted uses in the shorelines of the states, and sets priorities for certain shoreline uses and developments. *Id*. The SMA standards are very different from "protecting" an area, since they allow some alteration, use and development, and mandate that water development uses have a priority for development. In other words, while the GMA "protects" areas from development and use, the SMA seeks "a balance" between that protection and the allowable development and use and allows uses which have no choice but to be on or near the shoreline. This approach is consistent with the Jefferson County Comprehensive Land Use Plan. ("Planning enhances our ability to weigh competing needs in our community and make judicious allowances for each. It affords us the opportunity to balance the demands of development with benefits of economic development and environmental protection.") Plan, p. 1-2.

Since the regulatory standards for assessing the validity of local ordinances differ significantly between the GMA and the SMA, one can see the wisdom of not regulating near shore areas under the CAO. The GMA and the SMA are indeed separate laws, and should remain separate in terms of process and procedure. I trust the Planning Commission recognizes the significant differences in the goals, standards and regulatory systems of the SMA and the GMA in terms of decision making.

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[2] In 2003, the Central Puget Sound Growth Management Hearings Board ruled in Case No. 02-3-0009C that "the primary and paramount policy mandate that the board gleans from a complete reading of RCW 90.58.020, particularly within the context of the goals and overall growth management structure Chapter 36.70A RCW, is one of **shoreline preservation, protection, enhancement and restoration**." *Shorelines Coalition et al. v. City of Everett at al*., CPSGHMB Case No. 02-3-0009C (January 9, 2003), p. 15 (Emphasis in original). After issuance of the Board's decision in the City of Everett case, the Washington Legislature intervened, enacting Chapter 321 of the Laws of 2003, [ESHB 1933]. This law clarifies how the Shoreline Management Act ("the SMA") is to be applied and interpreted by the Growth Management Hearings Boards in conjunction with the Growth Management Act ("the GMA") and the new authority delegated to the Boards by RCW 36.70C.480(3) to hear appeals of amendments to shoreline master programs. Therein, the Legislature stated the SMA shall be: "….read, interpreted, applied, and implemented as a whole consistent with decisions of the shoreline hearings board and Washington courts prior to the decision of the central Puget Sound Growth Management Hearings Board in Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology." Washington Laws of 2003, ch. 320, Section 1. (Emphasis supplied). Since the adoption of ESHB 1933, the Central Board and the Washington State Attorney General have concluded that blanket treatment of SMA regulated shorelines as critical areas under the GMA is not appropriate. *See, Tahoma Audubon Society v. Pierce County*, CPSGMHB No. 05-3-0004c, Final Decision and Order (July 12, 2005) and AGO 2006 No. 2 at 4 (Jan. 27, 2006) ("The Legislature explicitly repudiated the Board's conclusion that shorelines of statewide significance are categorically critical areas which must be protected both under the SMA and GMA.") The wisdom of these rulings was confirmed in the *Futurewise* case.

Thus, the Commission should reject any regulation of the marine environment under the CAO, including all of the "integration" language found in the Draft SMP, which should be stricken. If the County accepts Staff's recommendation to integrate the CAO and SMP in terms of regulation of near shore areas, it will be difficult if not impossible for the public, and the Department of Ecology, to determine which portions are actually amendments to the Jefferson County Shoreline Master Program (which require state agency review and approval) and which portions are unrelated to the shoreline (and may be approved by the City Council). Clearly, this would present serious practical difficulties without regard to its obvious illegality.

THE SMA STANDARDS FOR REGULATION

Since the SMA standards control, I turn to a brief explanation of the law on shoreline use and development. The State Guidelines for revising SMPs acknowledge that there is a "balance" in the SMA regarding the use and development of the shorelines:

> The policy goals for the management of shorelines harbor potential for conflict. The act recognizes that the shorelines and the waters they encompass are "among the most valuable and fragile" of the state's natural resources. They are valuable for economically productive industrial and commercial uses, recreation, navigation, residential amenity, scientific research and education. They are fragile because they depend upon balanced physical, biological, and chemical systems that may be adversely altered by natural forces (earthquakes, volcanic eruptions, landslides, storms, droughts, floods) and human conduct (industrial, commercial, residential, recreation, navigational). Unbridled use of shorelines ultimately could destroy their utility and value. The prohibition of all use of shorelines also could eliminate their human utility and value. Thus, the policy goals of the act relate both to utilization and protection of the extremely valuable and vulnerable shoreline resources of the state. The act calls for the accommodation of "all reasonable and appropriate uses" consistent with "protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life" and consistent with "public rights of navigation." The act's policy of achieving both shoreline utilization and protection is reflected in the provision that "permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, in so far as practical, any resultant damage to the ecology and environment of the shoreline area and the public's use of the water." RCW 90.58.020.

WAC 173-26-176(2).

The quoted language from the State Guidelines is based upon a long series of cases which have construed the SMA as allowing reasonable use and development of the shorelines of the state. As a general matter, the SMA declares that it "is the policy of the state to provide for the

management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses." *See* RCW 90.58.020. According to this State's highest court,

> The SMA *does not prohibit development of the state's shorelines,* but calls instead for "coordinated planning . . . recognizing and protecting private property rights consistent with the public interest."

Nisqually Delta Ass'n v. City of DuPont, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985) (emphasis added); *see also* RCW 90.58.020.

The policy of the SMA as set forth in RCW 90.58.020 strikes a balance between protection of the shoreline environment and reasonable and appropriate use of the waters of the state and their associated shoreline. This balance is recognized by the Washington Supreme Court:

> The SMA is to be broadly construed in order to protect the state shorelines as fully as possible. The policy of the SMA was based upon the recognition that shorelines are fragile and that the increasing pressure of additional uses being placed on them necessitated increased coordination in their management and development. The SMA provides that it is the policy of the State to provide for the management of the shorelines by planning for and fostering all "reasonable and appropriate uses". This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally the public right of navigation and corollary rights incidental thereto.

Buechel v. State Department of Ecology, 125 Wn.2d 196, 203, 884 P.2d 910 (1994).

The balance envisioned by the SMA anticipates that there will be some impact to shoreline areas by new development or continued use, repair and maintenance of existing structures or developments: "[a]lterations of the natural conditions of the shorelines and shorelands shall be recognized by the department." *See* RCW 90.58.020. The counterbalance to this shoreline development is the requirement that "[p]ermitted uses in the shorelines of the state . . . be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area. . . ." *Id*

A key focus of the SMA is on preventing "unrestricted" use or development of the shorelines or "uncoordinated development." Before enactment of the GMA, the only tool to address this focus was a SMP; now, however, the GMA and its planning and zoning provisions have been added to the mix of regulation. In terms of planning to avoid unrestricted development of the shorelines, the GMA solves many concerns. For one, in rural areas which comprise much of Jefferson County, the GMA has significantly "down zoned" land, thereby limiting future development intensity. *See* Comprehensive Plan, p. 3-4, Table 3-2, p. 3-5. Two,

in combination with other laws, such as the State Environmental Policy Act ("SEPA"), regulatory systems are now consolidated to avoid the need for new regulations to prevent duplication.

What are the implications of the new GMA regime for shoreline regulation? The Comprehensive Plan acknowledges some adverse impacts over the past decades associated with rapid growth on shorelines "in some areas." Plan, p. 8-5. However, the GMA now controls the rate and intensity of new rural growth. As the OSF sees it, County planners must acknowledge that the fear of unrestricted or uncoordinated piecemeal development of the shoreline has largely, if not totally, been resolved by enactment of a GMA compliant comprehensive land use plan and implementing regulations. Thus, enactment of preclusive new regulations based upon the desire to avoid the "mistakes" of the past is not necessary, particularly without an affirmative showing that the existing system is inadequate.

PROPER USE OF SCIENCE

(1) Standards

In designating and protecting critical areas, best available science is to be used. RCW 36.70A.172. While BAS is not explicitly a factor for an SMP update, scientific information must be considered and assessed. *See* RCW 90.58.100. To the extent science is considered, which it must, the science cannot be used in isolation from all of the other planning goals specified in the GMA or the SMA. RCW 36.70A.020; *HEAL v. Central Puget Sound Growth Management Hearings Board*, 96 Wn. App. 522, 979 P. 2d 864 (1999). For instance, the only purpose of the BAS requirement is to ensure that critical area regulation is not based upon speculation and surmise. *HEAL v. Central Puget Sound Growth Management Hearings Board, supra*. Thus, counties have the authority and obligation to balance scientific evidence among the many goals and factors set out in the GMA and the SMA, to fashion locally appropriate regulations based on the evidence and local circumstances. In this regard, science does not mandate the form nor extent of regulation. *See Swinomish Indian Tribe v. Skagit County*.

When considering what may be supportive science for the SMP update under RCW 90.58.100, OSF urges that undue weight not be given to the views of the state agencies expressed in "guidance documents." particularly where the science is non-specific to marine habits. For instance, the State of Washington Department of Ecology's manuals on wetlands and wetlands regulation, and the State of Washington Department of Fish and Wildlife ("WDFW") polices for protection for certain wildlife habitat have not been adopted as rules and regulations pursuant to the Administrative Procedures Act, Chapter 34.04, RCW. Therefore, these policies do not have

the force of law.[3] They are also skewed because of a narrow perspective. As one scientist has stated:

> What constitutes an allowable cost is not a matter solely of science. These deliberations require multi-faceted consideration of all of the consequences of the decision to include the effects on natural resources **and** the legal, social, political and economic consequences of the decision. Resource agencies must follow legislative mandates and rigorous rule making procedures before environmental criteria are codified in regulatory (RCW) or administrative (WAC) codes. Natural resource agencies such as the Department of Ecology and the Department of Fish and Wildlife are not generally charged with making multi-faceted appraisals, they are charged with protecting fish and wildlife, water, air, soil and sediment quality, etc. These one-dimensional tasks lead to one-dimensional thinking that is evident in the *Best Available Science* (Sheldon *et al*, 2005) written by WDOE and even more so in the WDFW recommendations of (Knutsen and Naef, 1997) describing perceived wetland and stream buffer requirements for protecting water quality and wildlife.

Dr. Kenneth M. Brooks, *Supplemental Best Available Science Supporting Buffer Widths in Jefferson County*, Washington, p. 3. (2007)

The WDFW has identified certain fish and wildlife species or habitat that it considers a priority for management and conservation, and has published a document entitled "Management Recommendations for Priority Species" which is intended to "assist" reviewing agencies, planners, landowners and members of the public in making land use decisions.[4] By design, these Management Recommendations are merely "generalized guidelines" without the force of law: "[These] Management recommendations are not intended as site-specific prescriptions but as guidelines for planning." *See* WDFW, Management Recommendations for Priority Species, Volume IV, Introduction (May 2004). Because they are general guidelines, the law does not mandate their use as official, binding performance standards for the regulation of land development and uses, but the Draft SMP impermissibly stipulates that they control.

[3] In 1991, the State of Washington Department of Ecology stipulated in litigation handled by the undersigned involving the Building Industry Association of Washington that its wetland guidance materials, including its "model" wetland ordinance, did not have legal force or effect.

[4] The WDFW is charged with protection of fish and wildlife species, in terms of their harvest or non-harvest, but has very limited authority over their habitat. Instead, the state legislature has determined that protection of wildlife habitat will be achieved through the GMA, the SMA, the Forest Practices Act (FPA), and the State Environmental Policy Act (SEPA), as well as through local government planning processes. *See* WDFW, Management Recommendations for Priority Species, Volume IV, Introduction (May 2004).

When local governments designate critical areas, the Washington Administrative Code ("WAC") provides that they "may" use the information, and advises that WDFW's priorities are not necessarily shared by all:

> Counties and cities should determine which habitats and species are of local importance. Habitats and species may be further classified in terms of their relative importance. Counties and cities may use information provided by the Washington department of wildlife to classify and designate important habitats and species. Priority habitats and priority species are being identified by the department of wildlife for all lands in Washington state. While these priorities are those of the department, they and the data on which they are based may be considered by counties and cities.

WAC 365-190-080 (5)(c)(ii).

A serious matter for the Commission's deliberations is the effect of science urged by some regulators without regard to requirements to protect private property rights. The *Heal* court held that a restriction of the use of property that is insufficiently supported by best available science violates constitutional nexus and proportionality requirements:

> [P]olicies and regulations adopted under the GMA must comply with the nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications . . . Simply put, the nexus rule permits only those conditions necessary to mitigate a specific adverse impact of a proposal. The rough proportionality requirement limits the extent of the mitigation measures, including denial, to those which are roughly proportional to the impact they are designed to mitigate. . . .
>
> . . . [F]or example, if the City proposed a policy prohibiting development on slopes steeper than 40 percent grade or requiring expensive engineering conditions for any permitted project, only the best available science could provide its policy makers with facts supporting those policies and regulations, which, when applied to an application, will assure that the nexus and rough proportionality tests are met. If the City failed to use the best available science here in making its policy decision and adopting regulations, the permit decisions it bases on those regulations may not pass constitutional muster under *Nollan* and *Dolan*. The science the legislative body relies on must in fact be the best available to support its policy decisions. Under the cases and statutes cited above, it cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make. If it does, that decision will violate either the nexus or rough proportionality rules or both.

Heal, 96 Wn. App. at 533-34 (emphasis added); *see also* Isle Verde Int'l Holdings v. City of Camas, 146 Wn.2d 740, 763 (2000) (striking down generic open space condition regardless of the specific needs created by a given development). As set out below under Specific Comments, many sections of the Draft SMP violate constitutional protections. The State Guidelines in this regard mandate protection of property rights. *See* WAC 173-26-186(5) ("Guiding Principles"). The OSF believes it is the obligation of Jefferson County to assess the validity of its proposed actions, not simply leave that to citizens who comment. Jefferson County must request a legal opinion from third party counsel as to the validity of the Draft SMP, measured against statutory and constitutional obligations to protect private property rights.

(2) Application of Standards

As noted, the BAS mandate is meant to preclude local authorities from relying on "speculation [or] surmise" when protecting critical areas. Heal, supra, at 531; *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d 824, 834, p. 8, 824, 835 (2005). Under the case law, this means that Jefferson County must identify the presence of important shoreline functions through preparation of a detailed and adequate Shoreline Inventory. A compliant inventory identifies discrete areas that need protection from development and assesses the extent and impacts of current development and the presence of important shoreline ecological functions. *See* WAC 173-26-201(3)(c) Obviously, this has not been done to date, so there is no support for the proposed blanket imposition of buffers on all shorelines, as well as much of the proposed new regulatory requirements found in the Draft SMP. The Comprehensive Plan mandates that buffers for fish and wildlife habitat areas "be consistent with the best available science for habitat protection." Plan, p. 8-29, p. 8-24 (Policy ENP 5.1). Best available science does not equate to superficial or incomplete analysis, nor does it excuse compliance with the State Guidelines in terms of securing required information.

The County is not able to extensively regulate all shorelines without justification in the record. What is needed is a demonstration that all near shore areas exhibit the presence of high functions and value to justify a blanket designation. There is no such definitive inventory in Jefferson County which determines what shorelines justify the "critical area" designation proposed by staff.

The purpose of science is to ensure that regulations are based on a reasoned analysis of appropriate science and meaningful, reliable, and relevant evidence:

> [Critical areas] are deemed "critical" because they may be more susceptible to damage from development. The nature and extent of susceptibility is a uniquely scientific inquiry. It is one in which the best available science is essential to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development.

Heal, 96 Wn. App. at 533.

Turning to the science, the most that can be said is that there is little scientific study of marine riparian zones at this time. The major work relevant to Puget Sound lowlands areas is the Canadian Manuscript Report of Fisheries and Aquatic Science, No. 2680. *See* **Attachment 1**. This report has been analyzed by Kitsap County staff in the context of consideration of marine buffers by the Board of County Commissioners, who confirmed that "…it was felt no good science currently exists to recommend vegetation buffer widths in the (marine habitat zone) at this time." *See* **Attachment 2**, Bolger e-mail.

Bainbridge Island is currently reviewing its existing CAO to consider possible additional regulation of marine areas, although that has been tabled in light of the Futurewise decision. Dr. Don Flora is providing comment. His resume is attached, **Attachment 3**. Enclosed as **Attachments 4 and 5** are Dr. Flora's analysis of the scientific literature which is often cited in the context of consideration of adoption of marine buffers for urban areas. As can be seen, the science relied upon is in a totally different context, and many of the functions and values of large width marine vegetated buffers appear overstated.

It is submitted that the studies often relied upon to support large riparian or marine buffers is out of context or irrelevant to Jefferson County's local circumstances. For instance, the studies show that the:

- BAS is from the East Coast and Midwest agricultural uses, such as feed lots, row crops and spraying chicken manure on fields then irrigating to study impacts, uses irrelevant to Jefferson County's situation.

- The rain patterns are different from the East Coast and Midwest. The Northwest receives its major rains in the winter, not the summer months.

- BAS in the NW is for logging near streams in rural areas.

- BAS indicating that vegetated buffers are needed for wildlife habitat does not apply to commercial zones and high density residential and appear irrelevant in rural Jefferson County under current GMA rural densities.

- BAS indicating the need for trees and shade to provide micro climate comes from the Midwest, the East Coast and the West Coast in remote forest areas and is based on protecting the temperature from rising in small shallow streams. The concept of micro climates does not apply to a large tidal body like Puget Sound or the Straits of Juan de Fuca.

- BAS in the NW demonstrates that streams in recently logged areas with no tree cover have better salmon production than those with tree buffers and shade. The increased warmth allows for faster growth of salmon and better survival rate.

- Shade could never cover or cool baitfish spawning beds. On the hottest summer days in Puget Sound, the sun is high in the sky and strikes all beaches directly except the upper 10 feet of northerly facing beaches with very tall trees on the shoreline or very tall banks – a rare occurrence.

As can be gleaned from a review of the attachments to this comment letter, essentially all of the studies relate to study of agricultural or forest uses, and the benefits of intact buffers in areas of the United States with vastly different circumstances and climate than found in Jefferson County. The GMA and SMA require consideration of "local circumstances," which in Jefferson County is shorelines with much diversity, a large amount of public ownership, and low intensity future rural development.

Some Board decisions reference the study *Marine and Estuarine Shoreline Modification Issues*. However, insofar as the study addressed marine shoreline buffers, it ultimately concluded that the current science is inconclusive and that additional study is required:

> [F]unctions of marine riparian vegetation need to be better documented in the scientific literature in order to create adequate policies for protection (e.g., functional buffer widths) and restoration . . .Experimental research now will allow us to fill knowledge gaps, learn from our actions, and minimize repetition of failures and wasteful expenditure of resources.
>
> . . . . .
>
> [T]he upper limit of the nearshore zone includes that area landward some distance from the intertidal zone. The strongest intertidal-upland coupling occurs where bluffs provide sediments that nourish beaches, where upland transition (e.g., dune) vegetation stabilizes the beach, and where fringing vegetation shades the intertidal zone and contributes insects (i.e. fish prey) and leaf litter (i.e. primary production) directly into the aquatic environment. This marine riparian zone also provides buffers from upland noise and water runoff. The characteristics and landward extent of the upland portion of the nearshore zone is unquantified and still requires directed research to define. Index 590 at 5 (emphasis added).

Index 590 (G.D. Williams and R.M. Thom, *Marine and Estuarine Shoreline Modification Issues*, Batelle Marine Sciences Laboratory, White Paper submitted to Washington Department of Fish and Wildlife at 81(Apr. 2001).

The most on point scientific study on marine riparian buffers is *Marine and Estuarine Riparian Habitats and Their Role in Coastal Ecosystems, Pacific Region*, which concludes that the science is insufficient to support uniformly applied big-buffers:

> [T]here are insufficient data in the scientific literature to recommend generic or region-wide setback distance . . . in marine riparian habitats. Further research is

> needed to determine buffer widths for various vegetation units that compose the marine riparian. In addition to research on biological functions such as fish food supply (e.g. for juvenile salmon rearing) and spawning (e.g. surf smelt and sandlance), studies need to be conducted on physical factors such as soil integrity . . .
>
> . . . [B]ecause of the variation in potential damage, the dimensions of the setback may have to be modified by site specific conditions such as slope stability . . . Not all types of blackshore habitat have the potential to act as sediment corridors through the marine riparian. In addition, not all industrial developments have the potential to create disruptive sediment supplies through the marine riparian. Index 1363 at 14. That is because research "on the importance of marine riparian habitat . . . are virtually absent from the peer reviewed literature" – which is one of the OSFal requirements for a study to qualify as best available science.

A critical question is what to do with the near shore areas where young salmon reside and migrate for three months per year. There is no science stating extensive buffers are required to protect this species' sporadic use of the near shore area, especially where the existing condition is a rural zoning which does not allow intensive new development or urban areas with a highly developed waterfront. Further, existing regulations preclude virtually any new development or construction during this period. *See* State Hydraulic Guidelines, WAC Chapter 220-110.

Just as the science does not support imposition of generic marine buffers or vegetation protection set asides, neither does the law. The legislature, in 2003, enacted Engrossed Substitute House Bill (ESHB) 1933. This law affirms that:

- Shorelines of statewide significance may include GMA critical areas, but that shorelines are not critical areas simply because they are shorelines of statewide significance;

- Critical areas within the jurisdiction of the SMA shall be governed by the SMA and that critical areas outside of the jurisdiction of the SMA shall be governed by the GMA;

- The GMA goals, including the SMA goals and policies, are continued to be listed without an order or priority.

Laws of 2003, ch. 321 Section 1 *codified* at RCW 90.58.030 and RCW 36.70A.480.

While the justification for a blanket buffer for all shoreline is the perceived need to protect critical habitat for salmon, no detailed marine shoreline inventory or ranking of areas according to their quality as habitat for fish is contained in the record. In *Tahoma*, the Central Board rejected a wholesale designation of marine shorelines as critical areas and commented

favorably on the work the County consultants did distinguishing "high value" and "low value shorelines." *Id*. At 44. Notably, the record in that case included a detailed marine shoreline inventory and ranking of areas according to their quality as habitat for salmon in response to a listing of Chinook Salmon under the Endangered Species Act. *Id*. At 53. Jefferson County's generalized Shoreline Inventory and Characterization report is an insufficient base to impose any new marine buffers, let alone the proposed 150 foot setback.

The Attorney General reached similar conclusions to those in the *Tahoma* case in response to a recent legislative inquiry. The Attorney General concluded: (1) that blanket treatment of SMA shorelines as critical areas was not sufficient, and (2) that in passing ESHB 1933, the Legislature intended local governments to engage in a more detailed and discriminatory process to identify what is critical about a shoreline as part of its review criteria before designating the SMA regulated shoreline as a critical area. AGO 2006 No. 2 (Jan. 27, 2006).

> [A]t least since the 2003 amendments to the SMA and GMA, it is clear that no shoreline of the state, including shorelines of statewide significance, is to be treated as automatically qualifying for critical area designation under the GMA. Rather, each jurisdiction is expected to evaluate its shorelines to determine the extent to which they contain areas meeting the "critical area" definitions set forth in RCW 36.70A.030(5).

AGO 2006 No. 2 at 4. The *Futurewise* case confirms the Attorney General's Opinion.

AGO 2006 No. 2 did not address the validity of generic buffers under RCW 82.02 or constitutional standards, but the *Citizens Alliance* case establishes that such buffers, and associated "vegetation preservation" set asides, are illegal. In this case, the Court of Appeals held that King County failed to meet its burden to show limits on land clearing to a maximum of 50 percent of site coverage was not an illegal tax, fee or charge on development of land as prescribed by RCW Chapter 82.02. The Appeals Court held not only that the vegetation clearing limit was a "tax, fee, or charge" but that there was no showing that the generic standard was reasonably necessary to ameliorate impacts directly related to a proposed site development and also that its effect was disproportionate to any possible impacts caused by clearing rural lands. Thus, the limitation was struck down. *Citizens Alliance for Property Rights, et al v. Sims, et al*, 145 Wn. App. 649, 187 P. 3d 786(2008). *See also, Isla Verde Int'l Holdings v. City of Camas*, 146 Wn. 2d 740, 49 P. 3d 867 (2002).

It is important to recognize that the best available science requirement is not only intended to provide protection for critical areas, but is also intended to protect economic and property interests from unsupported and unduly preclusive regulation:

> [T]he obvious purpose of the scientific requirement that each agency "use the best scientific and commercial data available" is to ensure that [environmental

> regulations] not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA's overall goal of species preservations, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives. *Bennett v. Spears*, 520 U.S. 154, 176-177 (1977) (reasoning adopted in *Heal*, 96 Wn. App. At 531). In this regard, the Washington State Supreme Court held that local government must provide a "scientific OSF, evidence of analysis, or a reasoned process to justify [critical area regulations].

Ferry County v. Concerned Friends of Ferry County, 155 Wn.2d 824, 835 (2005). Once again, the OSF reiterates the need for Jefferson County to assess property rights and the effect of the Draft SMP on these rights if adopted as proposed by staff.

A comparison to Pierce County's approach may be helpful. Pierce County was faced with the same task as Jefferson County. *See, Tahoma Audubon et al. v. Pierce County*, CPSGMHB No. 05-3-0004c, Order Finding Compliance (Jan. 12, 2006). On a remand order from the Central Board, Pierce County was tasked with revising its marine shoreline buffers and critical area designations. *Id*. Unlike Jefferson County to date, Pierce County used "scientific study which included data collection, field observations, and a recognized methodology . . . that can be replicated" to identify "stretches of marine shoreline with high habitat values for salmon." *Id*. at 4. Using a scientifically replicable method, Pierce County was able to identify and designate approximately 20 miles of its 179-mile of shoreline as salmon habitat justifying a 100-foot buffer. *Id*. at 2.

INTERNAL CONSISTENCY

Pursuant to the limited GMA/SMA integration, review of a new or revised SMP is measured only against compliance with the policies and requirements of the SMA and the Shoreline Guidelines (WAC Chapter 173-26) and the "internal consistency" provisions of RCW 36.70A.070, RCW 36.70A.040(4), RCW 35.63.125 and RCW 35A.63.105. *See* RCW 90.58.190(2)(b); RCW 36.70A.480(3). What this means is that a SMP must be consistent with Comprehensive Plan policies and its own provisions must be internally consistent.

The OSF has interspersed comments on the Jefferson County Comprehensive Land Use Plan and the inconsistencies of the proposed SMP draft on Plan provisions throughout its comments. The purpose here is to summarize some key concepts on approach, balanced regulation, the need to reflect local circumstances, and the need to promote economic development and to protect private property rights.

This commentator's review of the Comprehensive Plan demonstrates a well thought out and GMA compliant document. The purpose of the Plan is of relevance:

> This Comprehensive Plan has been crafted to incorporate the lessons learned in a difficult planning process. It is the intent of this Plan to accept and build on the difficulties of the past; identify appropriate solutions consistent with relevant laws, decisions, adopted policies, and community involvement; and propose a responsible strategy with which the County can effectively face the future.

Plan, p. 1.1.

As the Planning Commission can see, solutions for shoreline management must be consistent with relevant laws, decisions and adopted policies. As set out herein, in its detailed comments, the OSF demonstrates that the draft proposal is inconsistent with the general laws of the state, adopted court and Growth Management Hearings Board decisions, and it is internally inconsistent with some provisions of local laws.

The GMA imposes affirmative obligations to encourage economic development, promote economic opportunity for all citizens of the state, encourage growth in areas such as Jefferson County which are experiencing insufficient economic growth. RCW 36.70A(5); Comprehensive Plan, p. 1.9.

The GMA also provides significant protections for private property rights. Not only must private property rights not be taken for public use without just compensation, but the rights of land owners "shall be protected from arbitrary and discriminatory actions." RCW 36.70A.020(6); Comprehensive Plan, p. 1.9.

Jefferson County has strong Plan policies to enhance the rural economy:

> To ensure that Jefferson County can accommodate new economic development opportunities, policies are contained within this plan which encourage developing the necessary land base and rural infrastructure and services to accommodate modern economic activities; promote the County's natural environment as a basis of economic activities that are tourist or recreation-oriented; encourage and provide incentives for business to create "family wage" employment opportunities; and ensure that the County's quality of life is preserved as it is enhanced.

Plan, p. 1-13.

The Plan also acknowledges that there will be at least moderate growth in Jefferson County over the next 20 years. The Plan projects a total county-wide growth of 13,804 new citizens. The unincorporated rural and resource areas will accommodate 4,149 new citizens. Comprehensive Plan, p. 3-3. The Draft SMP, to the extent it seeks to preserve the status quo, does not accord with the obligation of the GMA to accept new growth, and accommodate it in both urban and rural areas, nor does it promote economic development in rural areas.

The Plan has strong policies to protect existing lots of record and property rights. Plan, pp. 3-4, 3-17. The OSF discusses these policies in more detail, when commenting upon and criticizing the Draft SMP's criteria for nonconforming uses. The OSF believes that the Draft SMP's treatment of nonconforming uses and existing lots of record is inconsistent with the Comprehensive Plan. The Plan recognizes existing lots of record as "legal lots," but the Draft SMP's imposition of generic buffers, and other requirements to maintain vegetation effectively preclude development on existing lots of record.

The Draft SMP also has a strong prejudice against any commercial uses in SMA regulated areas. However, the Plan provides for policies to protect legal existing uses, home based businesses, and cottage industries to provide for "the economic viability of businesses that are not included in designated commercial areas." Plan, p. 3-17. In terms of rural character, the Plan provides that preservation of the rural character and promotion of the rural lifestyle which includes the "opportunity to live and work in rural areas." Plan, Goal LNG18.0, p. 3-61.

The Comprehensive Plan itself is internally consistent; the Draft SMP is not. The Draft SMP unduly emphasizes environmental protection and preservation over all other goals and objectives. Significant redrafting is required if the County is to adopt a revised SMP that is internally consistent with the goals and objectives of the Comprehensive Land Use Plan.

The Plan encourages affordable housing. The Comprehensive Plan also has strong policies that developmental regulations and procedures intended to protect environmental quality minimize the "economic impact on the development of housing." Plan, p. 5-13 (Polices, HSP 2.1). The Plan's use of generic buffers and vegetation set asides directly conflicts with the stated policy. There are also other provisions of the Draft SMP which conflict with this policy, including those severely limiting exemptions for the repair and maintenance of existing facilities, construction of new single family protective bulkheads, the stated bias against private recreational docks, and many other provisions which are set out in the OSF's detailed comments.

Turning to economic development, in more detail, the Plan stipulates that "the County must develop an approach to create a climate for economic development that facilitates the recruitment of industry and the retention and strengthening of existing businesses." Plan, p. 7-1. The Plan strives to achieve a "balance between social needs, the environment and the economy," that is, "sustainable economic development." Plan, p. 7-2. Tourism is one of the targeted industry programs. Goal EDG 3.0, Plan, p. 7-5. In the opinion of the OSF, the Draft SMP conflicts with the stated policies.

As set out in its detailed comments on the Draft SMP, Article 4, the draft proposal significantly expands restrictive shoreline designations, and creates new designations which preclude virtually any new commercial development or use, even those that would provide important new access to the waters of the State for the public, and would promote tourism. The Draft SMP's huge expansion of what is considered to be the Priority Aquatic, Natural and Conservancy shoreline designations cannot be reconciled with any of the Comprehensive Plan

policies for encouragement and facilitation of economic opportunities and the encouragement and support of economic development for rural lands. *See* Plan, Goal EDG 5.0; EDG 6.0, p. 7-6.

It is noted that the Plan has an explicit goal to promote the Port of Port Townsend "as a valuable tool to implement industry, trade strategies and promote employment opportunities." Plan, Goal EDP 4.5, p. 7-6. Yet, as set out below in its detailed comments, the OSF believes that the Draft SMP has significant restraints on the expansion of the Port District or the establishment of new port districts or port district facilities. The Draft SMP essentially prohibits any mixed use developments if a component is non-water dependent or related, and mandates that new industrial and commercial uses are conditional uses in all shoreline environments. Most importantly, while the Draft SMP states that shorelines which could serve as future port facility sites should be protected from incompatible uses, the Draft over-designates restrictive shoreline designations, and prevents any new commercial industrial uses in these designations. The SMP is not only internally inconsistent in this regard, but inconsistent with Comprehensive Plan policies for the Port District and economic development.

The Plan has a goal, EDG 8.0, to "promote the development of tourist and tourist related activities as a provider of employment and business opportunities in Jefferson County." This includes an implementing policy, EDP 8.4, Plan, p. 7-8, to "encourage public access to water bodies …." As set out below in its detailed comments, the OSF believes that the Draft SMP unduly restricts creation of new accesses and facilities to the waters of the State, including boat launches, private and public docks and piers, and mooring buoys. Once again, the Draft SMP is internally inconsistent with the Comprehensive Plan Policies.

It is true that the Comprehensive Plan has well thought out goals and policies to protect the environment, including the marine environment. Those goals must be balanced with land use goals and policies for economic development, existing uses, legal lots of record, and rural economic development. The Plan states that:

> RURAL RESIDENTIAL LAND USE
> GOAL:
> LNG 2.0 Establish land use goals and policies in the Land Use Element of this plan that are internally consistent with and reflective of the goals and policies of all other elements of the Plan.

Plan, p. 3-47.

Overall, the OSF believes the current draft of the SMP is all about preservation, even enhancement, of shorelines, and little or nothing about development. The Comprehensive Plan, however, states:

> GOAL:
> ENG 5.0 Allow development along shorelines which is compatible with the

> protection of natural processes, natural conditions, and natural functions of the shoreline environment.

Plan, p. 8-24.

The Comprehensive Plan is about balance, protecting the environment but allowing measured new development and use of the shorelines. It is not about *carte blanche* preservation. Much work is needed before the Draft SMP will be consistent with the goals and policies of the Comprehensive Land Use Plan.

GENERAL COMMENTS ON SMA REGULATION

(1) Restoration and Buffers

A major focus of the Draft SMP is establishing new buffers of 150 feet in width. The "larger buffer-oriented" proposals urged by County staff are designed to implement a strategy that buffers must be part of any critical area or shoreline management program and should be adopted wholesale as part of any SMP update. Proponents of this strategy urge that the science of buffers is well suited to "built environments," is properly directed to existing conditions, and/or can prevent "future impacts." This approach ignores current GMA rural zoning requirements, impermissibly assumes unrestricted future development and does not consider the efficacy of existing regulatory systems.

The large buffer strategy is at the heart of a "de facto" restoration program designed to return the land to some pristine prior undeveloped state or condition, even though there is no authority under the SMA or the GMA to restore or rehabilitate shoreline areas. The OSF submits that overly expanding existing shoreline buffers is not a good strategy for Jefferson County, because it results in the elimination of many "nonconforming" structures and uses within the shorelines. This is the inevitable result, because nonconforming uses and structures are highly disfavored under the law. The better approach is to establish clear performance standards for a site-specific analysis of the impacts of proposed development, including the possible imposition of buffers on a case-by-case basis. For instance, the City of Seattle's CAO simply establishes additional standards for development within established marine zones, a process available to Jefferson County.

The designation of more "critical areas," including fish and wildlife conservation areas and associated marine under the GMA and SMA has been pushed by the State of Washington Departments of Ecology ("DOE") and the WDFW. To an extent, the Department of Community, Trade and Economic Development ("CTED") has endorsed the concept of larger buffers as well. *See*, *in general*, *Protection of Critical Areas and the Mythology of Buffers*, by Alexander W. Mackie, "Growth Management In Washington," CLE seminar, November 15-16, 2004, Seattle. However, CTED specifically cautions against uncritical acceptance of the compilations of published lists of "science" relating to buffers, and strongly suggests that local

governments critically examine the applicability of the published materials to make sure recommendations are appropriate for local land use and conditions. In this regard, the CTED Guidelines state:

> The standard buffer widths presume the existence of a relatively intact native vegetation community in the buffer zone adequate to protect the wetland functions and values at the time of the proposed activity.

(CTED, Critical Areas Assistance Handbook, Appendix A)

The OSF believes there is no need to significantly revise the existing SMP and its current buffers just because some state or local agency staff believes that "more" needs to be done. At a minimum, the proposed SMP is over-inclusive as to the treatment of near shore marine areas. Thus, the OSF suggests that the Planning Commission critically examine for itself what is really needed, if anything, in terms of more shoreline area regulation or larger buffers for near shore marine areas. As noted above, CTED specifically cautions against uncritical acceptance of compilations or published lists of "best available science," and strongly suggests that local governments examine the applicability of the published materials to make sure recommendations presented under the guise of "science" are truly appropriate for local use and conditions.

Some comment letters will likely suggest a "precautionary approach," asserting buffers are needed because the existing shoreline is "degraded" or the science "unclear." There is no record of extensive shoreline degradation in Jefferson County (Comprehensive Plan, p. 8-5), but it is true that the Central Board has alluded to the "immature science dilemma," *Hood Canal Environmental Counsel, et al. v. Kitsap County,* CPSGMHB, 06-3-00122, at 41-42 (Final Decision and Order (August 28, 2006) (2006 WL 2644138), suggesting imposition of buffers in the face of doubt without regard to their efficacy. How this approach is reconciled with the GMA and SMA planning goals, and the case law is not explained, and the Board does not have the last word here, which is reserved to the courts.

A precautionary principle is not one of the GMA and SMA planning goals. RCW 36.70A.020, RCW 90.58.020. The GMA and the SMA instruct and authorize local government to consider and balance all GMA planning goals (including protection of property rights) in order to develop locally appropriate critical area regulations. RCW 36.70A320; RCW 36.70A.3201; *Clallam County v. Western Washington Growth Management Hearings Board,* 130 Wn. App. 127, 139 (2005) (The GMA requires that local government "must balance protecting the environment" against other GMA planning goals.); *Wean,* 122 Wn. App. At 173; *Heal,* 96 Wn. App. At 531-32.

Neither the GMA nor the SMA authorizes local government to restrict the use of property in the absence of having actually identified impacts on the functions and values of critical areas. The best available science mandate is meant to preclude local authorities from doing exactly what Kitsap County did when it imposed generic buffers – rely upon "speculation or surmise."

See Ferry County, 155 Wn. 2d at 837-38, *Heal*, 96 Wn. App. At 532. Now, under the law, it is clear that these large buffers are illegal set asides under the *Citizens Alliance* case. Jefferson County must not repeat this mistake, thereby exposing itself to a class action regulatory takings claim. Under the Ferry County decision, Jefferson County must identify the actual presence of functions and values that need to be protected from the effects of development and avoid the proposed blanket vegetation protection designation and the 150 foot buffer urged by staff.

Both the GMA and its implementing regulations require that regulations adopted under the GMA and SMA not violate property rights. RCW 36.70A.360; WAC 365-195-855 (development regulations adopted under GMA are specifically subject to RCW 36.70A.370's mandate to protect property rights); Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property (AGO 2006). Thus, Jefferson County must assess the impact of the Draft SMP on property rights, which to date, it has failed to do, in combination with the science and not act upon guesses or fears.

SPECIFIC COMMENTS

The OSF's comments from a legal perspective on the Draft SMP are grouped for ease of review by the Planning Commission to follow the outline of the Draft SMP. These comments are in addition to the comments the OSF and/or its members will provide from a property owner/citizen perspective.

Article 1. Introduction

1. Purpose and Intent.

The purpose to "plan for restoring shorelines that have been impaired and degraded in the past" is a worthy goal. At times in the Draft SMP, this goal is stated as a voluntary or non-regulatory item, which it must be. However, at other times, for example, the use regulations for marinas, it is placed in as a requirement set out in mandatory terms. The SMA cannot be construed as imposing a mandatory requirement to restore shorelines, so all mandatory requirements for shoreline restoration must be stricken. The OSF does want to laud Jefferson County for its apparent willingness to work in a cooperative fashion with citizens to restore shorelines, commensurate with public or private funds. In this regard, it should be remembered that one way to fund voluntary restoration is to allow measured new development and use.

2. Applicability.

The Draft SMP's provisions for administration of exemptions, as set out in more detail below, go well beyond the bounds of the law. The County does not have the authority to "regulate" exemptions to shoreline substantial development permits in a way to effectively treat exemptions as permits. The Draft SMP deals with exemptions as permits, when in fact issuance of exemption is a ministerial act. For instance, the Draft SMP provides in several sections that

shoreline exemptions must be "consistent with this program." Draft, pp 9-1, 9-6. This language mandates compliance with all provisions of the SMP, including its use regulations, not just policies. The Shoreline Hearings Board struck down a similar process when it invalidated the SMA Rules:

> Part III of the guidelines regulates exempt uses by requiring that local governments issue **letters** of **exemption** to cover activities that are not subject to permit requirements. Those letters must set forth a statement that "All uses and development occurring within the shoreline jurisdiction must conform to chapter 90.58 RCW, the Shoreline Management Act and this master program." WAC 173-27-190(2)(3)(iii)(A). Part IV of the guidelines requires, in the case of exempt developments, that the **letter** of **exemption** include conditions "where necessary to ensure that the development does not cause significant ecological impacts or contribute to potential adverse cumulative impacts." WAC 173-27-300(2)(g)(i). Under Part IV, the master program must include a mechanism for assuring that the development meets the mitigation requirements of the **letter** of **exemption**. This may include a performance bond. WAC 173-27-300(2)(g)(ii). Local governments must also provide a means for final inspection of exempted development and send the results of final inspections to Ecology.
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> * * * *
>
> The provisions governing letters of exemption under [Department of Ecology Guidelines] exceed the statutory authority of the SMA. The provisions are therefore invalid. The [required] letter of exemption operates as a permit. It sets forth conditions and requires enforcement mechanisms for those conditions including, possibly, a bond. These terms create a new permitting process for activities that are specifically exempt from shoreline permit requirements. The letter of exemption created [by Ecology] is also devoid of the procedural requirements of a shoreline permit, or for that matter, any other land use permit. Additionally, the conditioned letters of exemption do not give notice to the public as required under RCW 90.58.140 or an opportunity to appeal the terms of the letter of exemption under the SMA, RCW 90.58.140 or an opportunity to appeal the terms of the letter of exemption under the SMA, RCW 90.58.180(1), for the permitee [*sic*] or an aggrieved third party. *Putnam v. Carroll*, 13 Wn. App. 201 (1975). Because the new guidelines [by Ecology] essentially

> create a permit for activities that are specifically exempt for shoreline permits, [they are] invalid.

See SHB Case No. 00-037 (Order Granting and Denying Appeal, 2001); 2001 WL 1022097.

3. Governing Principles.

Subsection 3.B is excellent, acknowledging that the SMP must be consistent with the statute, and the SMA controls. The problem, as set out in my comments below, is that there are a significant number of inconsistencies with the draft and the SMA as written and interpreted.

In subsection F, Integration, Jefferson County assumes that by adopting its Critical Areas Ordinance by reference in the SMP, it has complied with the law. This is not correct. As determined in the *Futurewise* case, the SMA controls in shoreline areas. This is not a matter of semantics. As set out above, there is a significant difference between SMA and GMA regulation, both in purposes, context and the actual upland and marine environments. The SMA is about balance, while the GMA is about protection and preclusion of development and addresses uplands where there is more flexibility in terms of choices to locate new development and uses. These regulatory standards cannot be reconciled, which is why the SMA controls in shoreline areas.

The reference in subsection G(1) to "potential ecological functions" is unclear. Under the law, only probable or foreseeable impacts must be mitigated. *See* RCW Chapter 43.21C; WAC 173.26.186(8)(d) (reasonably foreseeable cumulative impact must be considered). It is inappropriate to have property owners and developers guess at "potential" ecological functions. This kind of vague standard can be used to prevent reasonable development under the guise that "something bad may happen." The language should be stricken unless Staff identifies what "potential" ecological functions they have in mind.

In subsection G(3), there is no basis in the SMA to infer that exempt uses may be denied if they will cause a "net loss of shoreline ecological functions." The SMA provisions for exemptions do not have such a limitation. However, under modern regulatory systems, typical exempt structures such as private docks or single-family residential bulkheads do not have measurable impacts. *See* **Attachment 6**, Pentech Report. *See also* Pederson comments, quoted below.

The reference to cumulative impacts and allocating impacts on a cumulative basis mirrors language in the State Guidelines. *See* WAC 173-26-186(8)(d). The problem, as set out above, is that Jefferson County's Cumulative Impacts Analysis is cursory. It is respectfully submitted that until the County does a better job with its Shoreline Inventory and Cumulative Impacts Analysis, it should defer adoption of the Draft SMP. There is sufficient time to do so, since the County is not obligated to complete its SMP update until the year 2011.

6. Critical Areas Regulations Adopted by Reference

This subsection is patently illegal. The public may properly ask, "What is the point of revising the SMP, if the Jefferson County CAO regulations are adopted by reference, and the most restrictive requirements apply?" Once again, the standards for critical area regulation differ substantially from SMA regulations. Further, there is no showing in any of the documents prepared to date by Jefferson County, including the Shoreline Inventory, that all areas regulated by the SMA are "critical areas" as those terms are defined by the GMA.

In addition, by deeming all shoreline areas "critical areas," the County effectively makes the existing built environment nonconforming. This is a highly disfavored status under the law. For instance, if discontinued, the use expires. Further, in the Draft SMP, pp.10-6, 10-7, it is specified that non-conforming development must meet current standards if damaged more than 75%, and no expansion is allowed for commercial structures except in the same footprint. No change of use is allowed accept via a conditional use permit. Draft, p. 10-8. Any use approved by a CUP must conform to new requirements. Draft p.10-6. No replacement of non-conforming building or structures is allowed in the Aquatic or Priority Aquatic designations without meeting new requirements. Draft, p. 10-6. The restrictions in these shoreline environments are so severe that abandonment of existing uses is likely the only option. Also, little relief is provided by allowing "shoreline variances." The criterion for obtaining a variance is very strict, "showing of extraordinary circumstances" for relief. Draft, p. 9-7.

This approach is inconsistent with Comprehensive Plan policies. Planning decisions must be "consistent with the intent of the Comprehensive Plan." Plan, p. 1-16. The Plan protects non-conforming uses and allows them to be replaced or expanded. Plan, Goal LNG 8.0, Plan, p. 3-54. According to the Comprehensive Plan, "a legal nonconforming use may change to a different non-conforming use of equal or less intensity." Policy LNP 8.7, Plan, p. 3-55.

The current approach set out in the Draft SMP will, in my opinion, not be sustained if appealed. Further, it is a huge expansion of regulation, the implications of which should be explained fairly and up-front by Staff to County policy makers and the public. Instead of incorporating other regulations, such as JCC 18.22, the better approach is to **defer** to existing regulations where necessary, such as the County's SEPA Ordinance. The Final Integration Strategy dated September, 2006, lists some existing regulatory systems that are already in place, thus avoiding the need to enact extensive new provisions in the Draft SMP.

Article 3. Master Program Goals

The OSF lauds Staff for advising the Commission that the goals set out in Article 3 are not listed in any order of priority. It is noted that the conservation goal includes the admonition to "enhance" shoreline resources and their ecological functions. While this is a good goal, it cannot be made a regulatory requirement.

In the Economic Development Goal, the statement is made that activities "should not disrupt or degrade the shoreline or surrounding environment." The OSF agrees with this standard, with insertion of the words "materially" or "substantially." As set out in the *King County Boundary Review* case referenced below, all land development use will have some impact, and the purposes of state laws (including the SMA, SEPA and the GMA) are to prevent significant impacts through use of reasonable mitigation and good planning. It is inappropriate to suggest that immeasurable impacts be prevented when the law assumes such impact will occur and if they were to be prevented no new development or use could ever happen. This micromanagement approach simply pushes away property owners and developers, when a responsible approach to good shoreline planning development and use is what is required. Over-regulation is a disincentive to encouraging voluntary efforts to both mitigate impacts and enhance and restore the shorelines.

The OSF questions whether Section III, Historic, Archeological, Cultural, Scientific and Educational Resources, should be part of the SMP. These elements can be dealt with under the State Environmental Policy Act. The SMA does not explicitly address historic and ecological resources.

The Public Access and Recreational Goals are excellent. This is some of the best work of Staff, and the OSF commends the approach, with one caveat. As set out below, the proposed use regulations for public access are too onerous. The OSF believes the Commission will have a fair amount of redrafting to do to match the goals of public access and recreation and shoreline use with the proposed regulatory requirements. In this regard, the Staff approach is systematically one of over-regulation, with an undue emphasis on protection of shoreline functions and values. Once again, the SMA allows "alterations" to the shorelines, and those alterations will have some impact. The goal is not to prevent impacts *per se*, but to mitigate significant or meaningful impacts to avoid "net loss" of important shoreline ecological processes.

The restoration and enhancement goals are also excellent, particularly the goal to provide "fundamental support to restoration work by various organizations by identifying shoreline restoration priorities, and by organizing information on available funding sources for restoration implementation." Draft SMP, pp.3-4. The problem, as set out above, is that the County's work to date on the Shoreline Inventory is superficial. Without a well thought out and documented shoreline inventory, which then serves as the base for the restoration plan, it seems that the language regarding restoration and enhancement has insufficient substance. Without good information on actual impacts to date, and existing shoreline functions and values, the void is proposed to be filled by over-regulation as set out in the proposed Draft SMP. The OSF cannot support this approach. The County needs to put more resources into its Shoreline Inventory, Cumulative Impacts Analysis, and Restoration Plan, before considering revisions to the SMP. Only with this information can sound regulatory choices be made.

Turning to Item 7, Shoreline Use, the OSF has reservation with Goal B-4 which requires that all new development be "consistent with" the Land Use and Rural Element in other pertinent

sections of the Comprehensive Plan and the Growth Management Act. To the extent this language is intended to layer Critical Areas Ordinance regulation under the GMA onto the SMP, it goes too far. It is impossible to have well thought out SMA use regulations be "consistent with" CAO provisions, since the regulatory standards differ. The SMA standard of balance and reasonable development cannot be reconciled with the protection and preservation standard of the CAO for critical areas.

The OSF questions whether the Transportation and Utilities and Essential Public Facilities goal is really required in the SMA, but defers to the Planning Commission. These concepts are better dealt with under the GMA and the County's Capital Facilities Plan.

Article 4. Shoreline Jurisdiction and Environmental Designations

The OSF has significant concerns with the proposed "official shoreline map." What comprises the "official shoreline map" is of significant importance. It is obvious that Jefferson County is enacting new shoreline designations, including Priority Aquatic, which have use regulations which severely restrict shoreline use and development. Thus, what areas constitute the more restrictive shoreline environments, including Priority Aquatic, Conservancy and Natural, becomes of utmost importance. The State Guidelines do not mention a "Priority Aquatic" shoreline environment, so the basis for this new designation is unknown. Such basis, if any, should be provided to the public.

In reviewing the drafts handed out at the December 3, 2008 meeting, it appears that the Natural designation in the new Draft SMP is increased to approximately 41% of the shoreline, in all respects, in the rural areas of Jefferson County since Port Townsend has its own shoreline master program. In reviewing information in the record, under the existing SMP, there is 97,754 lineal feet of shoreline designated "Natural." Under the new proposal, that designation has grown to 459,180 lineal feet.

The "Natural" designation is extremely restrictive. The OSF believes that the increase in the Natural shoreline environment is not consistent with the State Guidelines, WAC 173-26-211.

The OSF urges the Commission to carefully look at the proposed new shoreline maps. Understandably, it is easy to ignore these maps when focusing on the actual use regulations. But the shoreline designations and use regulations work together, so both need to be addressed.

Article 5. Shorelines of Statewide Significance

Some context is in order before providing specific comments. It has been my experience that the concept of "shorelines of statewide significance" has been misunderstood by some local planners. This is not to necessarily suggest that such is the case in Jefferson County, but the Planning Commission should understand that all areas of Puget Sound and the Straits of Juan de Fuca are deemed "shorelines of statewide significance." RCW 90.58.030. This designation does

not change the balance of the SMA in terms of reasonable use and development of shorelines, however. Let me explain.

First, the SMA does not elevate the preservation of undeveloped shorelines above all other SMA goals and policies without adequate justification or basis, even on shorelines of state-wide significance. This point was emphasized by the Supreme Court in *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985). Second, under the SMA and cases construing its policies, designating a shoreline as being of state-wide significance only "provides greater procedural safeguards;" it does not prohibit "limited alteration of the natural shorelines" for reasonable and appropriate shoreline uses, especially the preferred water-dependent uses such as private residential docks and piers. *Nisqually Delta Ass'n v. City of DuPont, supra*, at 726.

The quoted language emphasizes that the designation of a shoreline as one of state-wide significance does not eliminate the balance that inheres in the policy of the SMA between protection of the shoreline environment and reasonable and appropriate use of the waters of the state and their associated shorelines. RCW 90.58.020; *see also* WAC 173-26-176(2); *Buechel v. State Dept. of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994); *State Dept. of Ecology v. Ballard Elks Lodge No. 827*, 84 Wn.2d 551, 557 P.2d 1121 (1974). This point is confirmed by the Comprehensive Plan, which states that "the purpose of the Environmental Element is to establish goals and policies that, when implemented effectively, achieve a balance between land development and use activities and environmental protection …." Plan, p. 5-1.

Subsection 3 of Article 5, Use Preferences, contains some concepts that are not supportable in the opinion of the OSF. For one, Sub item A(1) states that "when shoreline development or redevelopment occurs, it shall include restoration and/or enhancement of ecological conditions as such opportunities exist …." The problem with this section is that it is stated in mandatory terms. As set out above, restoration and/or enhancement of ecological conditions cannot be mandated under the SMA.

Subsection 4 introduces the concept of "compatibility with other approved uses." Compatibility is not a concept found in the SMA and is only vaguely referenced in the Jefferson County Comprehensive Plan.

Article 6. General Policies and Regulations

The OSF has significant concerns with Article 6. Article 6 is of importance, because according to the draft, the "policies and regulations in this article apply to all uses and developments in all shoreline environments."

Under Subsection 1, Critical Areas, Shoreline Buffers, and Ecological Protection, the first policy (No. 1) states that "uses and developments that may cause a future ecological condition to become worse than current conditions should not be allowed." The "may cause" concept is too vague. At a minimum, regulation should be based upon reasonably foreseeable consequences,

not conjecture. Further, it is not the ecological condition *per se* that is the concern of the SMA regulation, but rather, truly critical shoreline functions and values. Also, the language appears to read out of the law the opportunity to mitigate impacts. It is best that this language is simply stricken, and the County rely on the next subsection, "Regulations, No Net Loss in Mitigation."

In terms of the proposed mitigation standards, nexus and proportionality are not included. Without incorporation of these, the standards violate both RCW Chapter 82.02 and constitutional standards. Briefly, although a governmental agency can condition or deny a proposal based on SEPA, the agency must comply with certain statutory and regulatory requirements. *Cougar Mountain Associates v. King County,* 111 Wn.2d 742, 752, 765 P.2d 264 (1988). Those requirements are contained in RCW 43.21C.060, which limits the exercise of substantive SEPA authority to condition preliminary plat and other land use approvals. *See also* JCC Section 18.40.770.

First, a project may be conditioned or denied "only to mitigate specific environmental impacts" identified in the environmental documents prepared under SEPA. RCW 43.21C.060. Under this statutory limitation on exercise of SEPA substantive authority, land development may be conditioned "only on the basis of specific, proven significant environmental impacts". *Levine v. Jefferson County* 116 Wn.2d 575, 807 P.2d 363 (1991), quoting *Nagatani Bros., Inc. v. Skagit Cy. Bd. of Comm'rs,* 108 Wash.2d 477, 482, 739 P.2d 696 (1987). The "specific adverse environmental impacts" that a developer may be required to mitigate must be directly related to the proposed development. That is, mitigation measures can only be imposed "to the extent attributable to the identified adverse impacts" of the proposal. WAC 197-11-660(d). These identified adverse impacts must also be "significant adverse impacts," as some impacts are always present in any land use. *See, e.g.,* WAC 197-11-350(2); RCW 43.21C.060; *Maranatha Mining Inc. v. Pierce County*, 59 Wash. App. 795, 801 P2d 985 (1990). The term "significant" is defined in SEPA to mean "a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794(1).

Second, the mitigating condition imposed under SEPA must be based "upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency." RCW 43.21C.060.

Third, mitigation conditions imposed under authority of SEPA "shall be reasonable and capable of being accomplished." RCW 43.21C.060.

In addition to the limitations under SEPA, there are statutory and constitutional limitations which apply as well. Starting with the statutory requirements, RCW 82.02.020 prohibits counties from imposing a "tax, fee, or charge, either direct or indirect, on …the development, subdivision, classification or reclassification of land" unless "reasonably necessary as a direct result of the proposed development or plat."

Washington's courts have interpreted RCW 82.02.020 to contain a statutory requirement that local government establish a "nexus" between a restriction on the property and the identified impact, as well as a limitation that the developer's required contribution to the solution of the problem be proportionate to his contribution to the problem itself. *See Citizens Alliance, Supra.*[5]

To meet RCW 82.02.020's "reasonably necessary" requirement, or nexus, an ordinance or land use decision containing a development condition or exaction must be tied to a specific, identified impact of a development on a community:

> [A condition on development] must "mitigate a direct impact that has been identified as a consequence of a proposed development" . . . reflects the legislature's adoption of the "nexus" requirement imposed by case law on governmental exactions and conditions. *Nollan v. California Coastal Comm'n*, 384, U.S. 825 (1987). Simply stated, there must be a nexus, a direct connection, 'between the condition and the original purpose of the building restriction." *Nollan*, 483 U.S. at 837. Where the exaction or other condition does not mitigate an impact of the development, it is an unlawful exercise of police power. *Unlimited v. Kitsap Cy*., 50 Wn. App. 723, 727 (1988).

Cobb v. Snohomish County, 64, Wn. App. 451, 467-68 (Agid J., concurring and dissenting in part) (Internal citations modified); *see also Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 761 (2002); *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 242-44 (1994).

Addressing constitutional standards, case law establishes rigorous requirements for nexus and proportionality which have been set forth by the United States Supreme Court and elaborated upon in Washington. *See. e.g., Nollan v. Cal. Coastal Comm'n, supra.; Dolan v. City of Tigard, supra*.; *Benchmark Land Co. v. City of Battleground*, 103 Wash. App. 721, 14 P.3d 172 (2000), *aff'd on other grounds in Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 695, 49 P.3d 860 (2002)*; Burton v. Clark County*, 91 Wn. App. 505, 520, 958 P.2d 343 (1998) (County conditioning of approval of a three-lot short plat on the landowner's dedication of road right-of-

[5] RCW 82.02.020 places the burden on the local government to demonstrate nexus. *See Isla Verde*, 146 Wn.2d 755056; *Home Builders Ass'n of Kitsap County v. City of Bainbridge Island*, 137 Wn. App. 338, 340 (2007). To do so, a local government "must show that the development . . . will create or exacerbate the identified public problem." *Burton v. Clark County*, 91 Wn. App. 505, 521 (1998). This means that a local government must demonstrate a nexus between the condition and the impact caused by development to legally impose project mitigation. *Nollan*, 483, U.S. 837 (1987). *See also* R. S. Radford, *Of Course a Land Use Regulation That Fails to Advance Legitimate State Interests Results in a Regulatory Taking*, 15 Fordham Envtl. L. Rev. 353, 390 (2004) (local government must demonstrate "a close casual nexus between the burdens imposed by the regulations and the social costs that would otherwise be imposed by the property's unregulated use.") "It is the requirement of a cause-effect nexus, not a means-end fit, that offers real protection against the imposition of unjustified or disproportionate burdens on individual property owners." R.S. Radford, IId. at 391.

way constitutes unconstitutional taking). The reason for requiring the municipality to demonstrate the impact of the development is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

There are other significant problems with Subsection B. One, the requirement that even exempt structures be located, designed, constructed and conducted and maintained in a manner that maintains shoreline ecological processes and functions may not be fully workable and violates the SMA. In particular, some residential bulkheads allowed to be constructed under exemptions may have some measureable impact on shoreline ecological processes and functions. The question becomes protection of property and persons over the environment. The Washington Legislature has already made this choice in terms of allowing exempt activities, including development of single family homes on shorelines, and protection through bulkheads.

The OSF believes Jefferson County does not have any authority to require a shoreline property owner to remove existing bulkheads. Under SMA exemptions for repair and maintenance of existing structures, existing bulkheads that were legally permitted, and other developments legally permitted or which predate adoption of the SMA in 1971, can be repaired and maintained. While the County may be able to "encourage" shoreline property owners to remove such structures through a redevelopment process, it cannot be mandated. In other portions of the draft SMA, the Staff uses the terms "strongly encourage" property owners to take actions such as removal of existing bulkheads. It is hoped that in practice, the concept of "strongly encourage" does not become a mandate. It is better that this language be stricken.

The OSF also has significant concerns with Subsection C, "Regulations – Cumulative Impacts." It is stated that "the County shall prohibit any use or development that will result in unmitigated cumulative impacts." Without a much better Shoreline Inventory and Cumulative Impacts Analysis than prepared to date, this language when implemented will likely become wide-open mandate to preclude future use and development. If a property owner demonstrates through a site specific analysis that there is no net loss to significant shoreline functions and values, then the County should as a matter of policy agree that cumulative impacts are not an issue.

The law is clear that unsupported allegations of future cumulative impacts are not a sufficient basis on which to deny shoreline applications. In *Wriston v. Ecology*, a conditional use permit and variance for a dock was denied by Ecology, in part because of the cumulative impacts that would be created by the approval of other docks in the area. *See* SHB No. 05-005, Findings of Fact, Conclusions of Law and Order (Sept. 28, 2005). While Ecology's denial letter did not explain the basis, Ecology provided testimony at the appeal hearing on its cumulative impacts theory. First, Ecology felt that population growth could result in growth pressure in Wahkiakum County as people sought to buy and develop less expensive waterfront property. *Id.* at p. 15. Second, Ecology was concerned that an approval would set a precedent that would result in

additional docks in the area, including docks that would require construction of shoreline access by trails or stairs on lots that do not currently have shoreline access. *Id.*

Although the SHB agreed that the proliferation of structures waterward of the OHWM should be prevented, the Board held that in order to establish that such proliferation is likely to occur, there must be a factual basis to support that likelihood. *Id.* The SHB found such a factual basis to be lacking in that case. *Id.* In finding that the "cumulative effects" provision had not been violated, the Board stated:

> In the north shore area at issue, SR-4 runs along the Columbia River in a number of areas. Thus, docks will not be built in these reaches. In other areas of the north shore, access to the shoreline does not exist and would be difficult to accomplish without significant expense and environmental permitting. Some of the parcels along the north shore appear to be deeper along the shoreline, which eliminates the need for docks needing variances. The WCSMP also designates part of the north shore area as a Natural Shoreline, where dock construction is prohibited. Thus, cumulative impacts are not likely to occur because the land use pattern in area will not result in additional requests for similar variances.

See Id. As a result, actual analysis of the potential for additional development must be performed and presented if the denial of a permit is based upon the cumulative impacts of future development.

Other SHB cases considering the denial of shoreline permits based upon perceived cumulative impacts are in accord. In these cases, the SHB reviewed the relevant facts regarding cumulative impacts and then determined whether Ecology's position was based in fact. In *Snow & King County v. Ecology*, SHB No. 98-020 (Oct. 20, 1998), which involved a request for a variance under WAC 173-27-170(3) for a residential pier, the SHB considered Ecology's allegation that because the proposed pier would be located between two existing piers, it would become a precedent allowing for increased density of docks on Lake Sammamish. *See Id*. at *5. The Board rejected this allegation, concluding:

> We find this argument unpersuasive for several reasons. First Lake Sammamish is highly developed already with hundreds of existing residential docks. The SMP prohibits more than one pier for any residence. KCC 25.16.140(B). Second, it was undisputed that of the 45-nonconforming lots on the entire lake (having less than 50 feet of shoreline), only 15 currently exist without a pier. Of these 15, only eight or nine are deemed potential locations for residential piers. If such piers were proposed, each would be decided on its own merits. In the instant case, we are not persuaded that any measurable detrimental effect could result from a maximum of eight or nine more piers on this highly developed lake.

Id.

Turning to Subsection D, "Regulations, Critical Areas, and Shoreline Buffers," the OSF repeats its objections to integration of JCC Chapter 18.22, and its incorporation by reference. The OSF also repeats is objections to the generic shoreline buffers established in Subsections 5 and 6. There is no factual, scientific, or legal basis for a "minimum buffer" of 150 feet on all shoreline environments. In addition, there is no basis for the 80% "vegetation retention" requirement within the specified buffer. As stated above, these types of generic set-asides have been struck down. *See Citizens Alliance, supra.*

In Subsection 3, "Regulations, Exemptions to Critical Area and Shoreline Buffer Standards," the imposed standards are too limiting. A building area of only 2500 square feet and driveway of not more than 1100 square feet would mean that long and narrow lots would not be able to be developed at all. The lot aggregation requirement is also unconstitutional, in my opinion, and inconsistent with Comprehensive Plan polices protecting and recognizing "existing lots of record as legal lots." Plan, p. 3-4.

The 30 foot setback from the high water mark is supportable. Setbacks of this nature in my opinion would probably survive legal attack, but I cannot make the same statement for the 150 foot generic shoreline buffer. I do not believe that the 80% of the buffer area between the structure and the shoreline be maintained in a naturally vegetative condition for non-conforming lots would pass legal test – it does not.

The water oriented use/development section needs more work. The redrafting should also deal with the definitions of these terms found at pages 2-42 and 2-43 of the draft. In particular, it should be explicitly set out that single family residential development which is exempt under the SMA is deemed a "water related use."

Once again, the OSF does not see the need to include policies for historic, archeological, cultural, scientific and educational resources in the SMP. Thus, in its opinion, the section found in the draft at pages 6-8 through 6-11 could be eliminated. This regulation duplicates sections of the SEPA, and the County's SEPA Ordinance, particularly for historic resources. *See* Integration Study.

The policies on public access are excellent, and the OSF commends Staff. However, by urging and promoting public access, on the one hand, the Commission must ensure on the other that the use regulations are drafted such as to implement the stated policy. There is no point in making strong statements in support of public access, yet preclude the construction and development of facilities which promote public access by adopting unduly onerous and restrictive use regulations. This is the case as set out below, *e.g.*, for beach access stairs. The OSF supports provision of private community access for single family residential developments of more than four units, but not public access, as well as the concepts which strongly encourage private and public community docks, and joint use docks.

Turning to Subsection 4, "Vegetation Conservation," the OSF repeats some of its remarks already made. For one, the science does not support imposition of large vegetated buffers on marine areas. Two, the SMA does not provide a mandate or authority to compel new uses or developments to establish "new vegetation such that the composition, structure, and density of the planned community resemble a natural unaltered shoreline as much as possible." Further, the OSF does not believe that the County has authority to mandate that existing shoreline homeowners maintain vegetation as a "preference" over clearing vegetation to create views or provide lawns.

The OSF does not believe that under the guise of granting a shoreline exemption, the County can control or prevent exempt developments or "encourage" retention of natural vegetation. Thus, under Vegetation Conservation, sub A, "Polices," more drafting is required. Subsection B, Regulations, Sub 1, the requirement that even exempt uses comply with buffer provisions of the SMP and JCC Chapter 18.22 must be eliminated. If left in, the language precludes what State law allows. The County should certainly have in the Draft SMP a goal to maintain native shoreline vegetation. However, the imposed mandates of a 150 foot generic buffer, and 80% vegetation retention, are much more than a goal – they are preclusive and regulatory. The OSF does support the sections of the Draft SMP requiring that shoreline property owners use innovative techniques where feasible to maintain existing native shoreline vegetation.

In Subsection 5, "Water Quality and Quantity," the policies and regulations are reasonably well thought out and drafted. However, the OSF believes that water quality and quantity can be protected through existing storm water management controls and regulations, "green development" techniques, and other measures without the need to impose large generic buffers or vegetation retention or restoration requirements. *See* Integration Study. *See also* Comprehensive Plan, Stormwater Management Policies, pp. 3-25, 3-26; pp. 3-66, 3-67; Table 8-1, p. 8-2. The OSF also believes the County has authority under shoreline policies to require malfunctioning or failing septic systems be updated and new systems to be located and designed to meet all applicable water quality, utility, and health standards. The same can be said for materials that come into contact with water – that they be composed of non-toxic materials. Because there are existing laws on water quality protection, the OSF questions the need for this section of the Draft SMP.

Article 7. Shoreline Modification Policies and Regulations

The OSF has concerns with numerous sections of this article. Its policies and regulations apply to "all types of shoreline modification" and are applied along with specific standards defined for each shoreline environment. These are in addition to use-specific policies and regulations set out in **Article 8**.

I have some introductory comments. The Draft SMP as proposed is the most restrictive this commenter has seen in his legal career. The length of the document alone is two to three

times that of the existing SMPs for jurisdictions around the State. This does not necessarily mean that the draft is dead on arrival, but it does caution that care should be taken to ensure that there is no over-regulation or duplication. As drafted, there is significant over-regulation and duplication, in my opinion.

Revising the SMP should not be deemed an opportunity for Staff to put in every conceivable concept, requirement or policy. The County has significant existing regulatory programs including its Zoning Code, SEPA Ordinance, and stormwater regulations which deal with a number of the concerns set out in the SMP. Further, there is a subset of State regulations, including the State Hydraulic Code and its implementing regulations, which deal with in-water development. This is layered onto federal regulation under Section 404 of the Clean Water Act, and it's implementing regulations. What is lacking is **any** Staff analysis of the effectiveness of these existing laws. Staff acts as if no regulations exist, and the Draft SMP must be a stand-alone document addressing every contingency.

Turning to specifics, commencing with beach access structures, each time the terms "minimize adverse effects on shoreline ecology" are used in Article 7, the limiting terms "material or significant" should be included before the word "adverse." As drafted, even inconsequential or even virtually unmeasurable adverse impacts could preclude development. The policies encouraging neighboring property owners to share beach access are excellent. The County also properly requires that applicants proposing beach access structures provide a site-specific analysis addressing potential adverse impacts.

The OSF strongly objects to the over use of a conditional use permit for shoreline access structures and many other structures or developments. For instance, when the Commission reviews Subsection B, "Shoreline Environmental Regulations," Draft, p.7-2, for most of the shoreline designations, it will see that a conditional use permit is required. Shoreline access devices typically are not of such consequence that a conditional use permit should be employed. Further, access stairs are a normal appurtenance to a single-family home. A conditional use permit is ultimately issued by the State of Washington Department of Ecology. The OSF sees no need to bring in Ecology for numerous, relatively routine permitting decisions which are more appropriately made at the local level.

Addressing Policy 2, while Jefferson County claims to recognize a balance between access and fragile ecosystems, the OSF believes the Draft policies unfairly burden and take away from an applicant/private property waterfront owner by:

- Requiring structurally unfeasible and unattainable beach access stair building dimensions to a large majority of waterfront;

- Unjustifiably placing the burden on a landowner to prove no environmental impact, without scientific justification;

- Imposing unclear evaluation criteria;
- Creating unnecessarily high permit costs; and
- Leaving open ended and unclear permit submittal requirements.

For Policy 5, the qualifier "high" and "significant" should be added to determine what is an inappropriat location due to safety hazards. In the Priority Aquatic environment, public access is allowed with conditional use permit but private access is prohibited. Private beach access should also be permitted in the Priority Aquatic designation as regulations 6 and 7 state they can be constructed waterward of the OHWM if there is no other feasible alternative. Most areas designated Priority Aquatic are in private ownership.

In Shoreline Environmental Regulation No. 2, Aquatic, beach access is permitted as a conditional use when allowed in the adjoining upland designation. Private beach access should be permitted outright. In Shoreline Environmental Regulation No. 3, for the Natural environment, private beach stairs are listed as prohibited. Private beach access should be permitted in the Natural designation because it is a compatible low intensity use, in particular since public access stairs are allowed. *See* Comment Letter, Peter Brockman.

Shoreline Environmental Regulation No. 5 does not work for a large majority of banks. There should be no vertical height limit within the slope. The vertical height within the slope should be the height structurally necessary to access the beach safely. In Article 7.1, Regulation No. 10, the Draft SMP prohibits beach access stairs if the bank slope where the structure is placed is "likely to require shoreline stabilization/shore defense works in the future." This language should be removed because it conflicts with SMA provisions allowing normal single-family protective bulkheads.

Turning to Subsection 2, "Boating Facilities," which includes boat launches, docks, piers, floats, lifts, marinas and mooring buoys, there are significant problems. Found within these provisions are important policy choices made by Staff which must be recognized by the Planning Commission. For one, the draft proposes that docks and piers should not be allowed where shallow depths require "excessive over water length." There is no standard for what is deemed "excessive." Without some redrafting, this section could preclude docks and piers on any bays or lakes located within Jefferson County, which conflicts with state exemptions for these structures.

There is a bias against docks, since Staff urges that the Commission establish a policy that the "proliferation of these docks should be prevented." This approach is not consistent with the SMA. The courts have ruled that private facilities which provide access for private individuals meet SMA priorities for public access to the waters of the state, since private property owners "are part of the public." *See, Jefferson County v. Seattle Yacht Club*, 73 Wn.

App. 576, 589-90, 870 P.2d 987 (1994). The Shoreline Hearings Board noted in a case involving approval of construction of a dock on Bainbridge Island that:

> Here we are concerned with the building of docks, a generally favored type of shoreline development, and the impact of allowing this on public access, another priority item. Of course, these private docks in a limited way improve access – the Hammer dock in particular, since it is to be a joint use facility [shared by two property owners].

The Supreme Court long ago declared the construction of private docks under the SMA to be a beneficial public use of the state's shorelines:

> *[O]ne of the many beneficial uses of public tidelands and shorelands abutting private homes is the placement of private docks on such lands so homeowners and their guests may obtain recreational access to navigable waters.* No expression of public policy has been directed to our attention which would encourage water uses originating on public docks, as they do, while at the same time discouraging any private investment in docks to help promote the use of public waters.

Caminiti v. Boyle, 107 Wn.2d 662, at 673-74, 732 P.2d 689 (1987) (emphasis added).[6]

The balance envisioned by the SMA anticipates that there will be some impact to shoreline areas by development, because alterations of the natural conditions of the shorelines must be recognized by Ecology. RCW 90.58.020. *See, Biggers*, P.3d at 22 ("The SMA embodies a legislatively determined and voter-approved balance between protection of the state shorelines and development …. As part of our careful management of shorelines, property owners are also allowed to construct water-dependent facilities such as single-family residences, bulkheads, and docks.").

Some balance is in order here. Private and public docks provide significant access to the waters of this state for the public. Boat launches, docks, piers, floats, marinas and mooring buoys all encourage recreational use and access. It is acknowledged that there will be some impacts with construction and use of these facilities, but under modern regulatory requirements, these are minimal. *See* Pentech Study, **Attachment 6**. But the SMA, as set out above, encourages alterations to the shoreline for priority uses, which include recreational use and access.

Staff suggests that priorities be set, favoring mooring buoys generally over docks, piers or floats. The OSF does not believe this is a wise approach. Mooring buoys at best serve maybe

[6] The DOE Guidelines similarly recognize docks and piers associated with a single-family home as water dependent preferred uses: "as used here, *a dock associated with a single-family residence is a water dependent use* provided that it is designed and intended as a facility for access of watercraft and otherwise complies with the provisions of this section." WAC 173-26-231(b).

one user, where docks, piers and floats can serve many more, without showing there would be markedly more impacts. The approach by Staff in the Draft SMP at this point is one of only protection and preservation. The OSF does not want to be understood as personally criticizing the Staff workup in the Draft SMP, but some judgments and balancing must be made if the citizens of Jefferson County are to actually use the waters of the state for priority uses. Further, private docks below a certain cost are exempt under the law. *See* Draft, p.9-4, Exemptions for Residential Docks.

The Draft, at p.4-5, states that the County will identify areas that are suitable for development and/or expansion of marinas and public boat launches, and "prevent them from being developed with non-water dependent uses having less stringent site requirements." While perhaps a sensible approach, precluding owners of private property from developing their land because it has "perceived public benefits" would violate constitutional principles. In addition, since the County's Shoreline Inventory needs much more work, it seems premature to designate any properties off limits for future development.

In terms of development of new marinas, the County insists that "affected parties and potential partners should be included in the planning process." This commentator has never seen such a requirement. What Staff believes would be "potential partners" or "affected parties" is unclear. The existing application process is set out in the County Code, which implements the Local Project Review Act, RCW Chapter 36.70B. These laws have adequate provisions for notice, public comment and participation. The language should be stricken.

It is noted that in the Shoreline Environmental Regulations, almost all of the facilities are handled as conditional uses. Once again, except for perhaps a marina, there is no point to have single-use docks, moorages and so forth denominated as conditional uses. This approach is an expansion of regulation and in the opinion of the OSF unduly delegates the local permitting process to the State Department of Ecology. The Draft substantially over-regulates mooring buoys, as policies on their use exist promulgated by the State of Washington Department of Natural Resources. The State of Washington Department of Fish and Wildlife also requires a Hydraulic Use Approval for these devices. All the County should do is simply be prepared to issue a shoreline exemption consistent with state guidelines. To require mooring buoys to be permitted subject to a conditional use permit in any shoreline environment is excessive over-regulation.

Turning to private residential docks, the length limitation of 60 feet measured horizontally from the ordinary high water mark is extremely restrictive. *See* Draft, p.7-10. Under local conditions as the OSF members understand them in Jefferson County, these standards would likely preclude any shoreline owner from reaching "blue water." Thus, it would be expected that boats would routinely ground and the facilities would be useable only for certain periods of the year under favorable tide conditions. A better approach is to allow docks to extend to a certain point in relation to the line of extreme low tide, minus 4.5 feet, such as four feet below -4.5. Other jurisdictions, such as the City of Bainbridge Island utilize this approach.

In this regard, it is interesting that the Shoreline Inventory does not provide any meaningful information on private dock construction or use. Nor does it conclude that docks have been a problem in Jefferson County to date. What appears throughout the Draft SMP is a Staff prejudice against any new development for many common facilities associated with shoreline use. If the County is disposed to place severe limits on new development, or redevelopment, there should be some basis in fact, science and law to do so. Modern regulatory standards for design of docks, and location and design of bulkheads, and other appurtenances commonly associated with single family development, ensure that there will be no significant adverse impacts.

It is noted that the Draft prohibits covered moorage in all of Jefferson County. As the OSF understands the limitation, this would include even the more intensive shoreline designations, including High Intensity. All that is allowed is covered moorage of 100 square feet over the overland portion of the dock or pier. It is not certain that the prohibition against covered moorage would also apply to marinas open to the public, and the OSF requests that the Commission clarify this point with Staff.

For the regulations on marinas, the OSF does not believe that the County has authority to mandate ecological restoration measures to improve baseline conditions over time. This should be a voluntary requirement.

The OSF has significant concerns with Subsection 7 of Article 7, entitled "Structural Shoreline Armoring and Shoreline Stabilization," which commences at p.7-28 of the Draft. It is noted that Policy No. 1 states that "because protecting ecological functions is a primary goal of the Shoreline Management Act, the County should take active measures to preserve natural or unaltered shorelines and to prevent the proliferation of bulkheads and other forms of shoreline armory." This view skews the SMA policies, elevating one policy over others, including those which allow the alteration of the shoreline to provide public benefits and priority on preferred uses. It also exhibits a strong prejudice against shoreline armoring without analysis whether existing regulatory systems adequately protect the environment.

Modern systems which mandate better location of bulkheads and shoreline armoring prevent the horror stories seen in the past, where large fills and seawalls were allowed well below the ordinary high water mark, with attendant significant adverse impacts:

> First, some historical perspective, based on my 18 years as a marine fish biologist and fishery manager with Washington Department of Fisheries, is useful. Prior to the discovery of upper intertidal (mostly in the +6 to +10 foot MLLW elevations) spawning by surf smelt, Pacific sandlance, and rock sole in sand/pea gravel substrates in reaches of many shorelines in the 1970s and 80s, many bulkheads were built over this intertidal zone without much general public regard for the value of the intertidal to salmonids or forage species that depend on this zone. Many shoreline residents did not, not only to protect property, but also to increase

> dry land. Regulations and policies were appropriately promulgated to severely restrict indiscriminant construction of marine bulkheads. This was especially true below the Mean High Water (MHW) elevations on beaches with documented forage fish spawning. It is my understanding that the waterward edge of the proponents' proposed bulkhead is sited well above the MHHW elevation, near or above the Ordinary High Water Mark (OHWM).
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> A rock bulkhead will not eliminate overhanging vegetation, shade, availability of terrestrial insects, or leaf litter. This is evident from other sites I have visited, where the bulkhead is landward of the MHHW tidal elevation. As woody material breaks off in high wind or dies and rots, it will fall down over the top of the bulkhead. The new bulkhead would allow more vegetation to grow and actually save the trees (valuable for bald eagle perching) at this site. I have seen many other examples of stabilized riparian trees overhanging rock bulkheads covering the upper intertidal zone. The proposed bulkhead will not result in "coarsening" of this beach. Because of the setting (vertical concrete bulkheads on either side), it will remain a "pocket beach" that continues to collect sand.

Report, April 8, 2008, Mark G. Pedersen (former WDFW employee), Kitsap County Hearing Examiner, Case No. 07-45866.

Because the SMA allows single family owners a protective bulkhead where necessary, it is unclear under what authority Staff urges that the Commission adopt a policy that proponents of new shoreline use and development, "including preferred uses and uses exempt from permits," should plan, design and locate, and construct and maintain the use/development to avoid any structural armoring works. Existing SMA and GMA authority does not allow the setback of new homes such to absolutely under all circumstances avoid the need for shoreline armoring forever, although GMA imposed zoning minimizes the need through use of setback requirements. In addition, it is not understood that the SMA prohibits the protection of property itself without regard to the threat to homes and appurtenant structures. It is questionable whether the County has authority to tell property owners of undeveloped shoreline lots that over the next century they can be expected to donate 50-100 feet of their property for perceived environmental benefits with no compensation or right of protection.

Many of the policies for shoreline armoring are excellent, including the obligation of a proponent to prepare a site-specific analysis. As I understood the SMA, I do not believe that Jefferson County can mandate that other options, such as beach nourishment or "soft bank" measures, be considered to the exclusion of a "hard" rock protective bulkhead. For some sites with high wave energy and long fetches, the existing literature demonstrates that "soft bank" facilities or techniques are not feasible, as Mr. Pederson found:

Regarding the alternatives to bank erosion control, I offer the following comments:

- I have reviewed a number of documents on the subject, including an Ecology publication: *Alternative Bank Protection Methods for Puget Sound Shorelines* (Zelo, et al., 2000). It presents several case histories of erosion control for sites of various shoreline types and habitat conditions. In some examples in this publication, depending on site conditions (generally high energy, steep slopes), rock bulkheads, placement of large rocks on the beach, revetments, and quarry spalls were chosen for use on the sites.

- I have looked at the literature and made an investigation as to the success of soft bank protection methods on locations similar to those of the proponent in this appeal. One of the experts in the field is Jim Johanesson with Coastal Geologic Services in Bellingham. He does mostly soft bank types of protection, mainly beach nourishment on lower profile, low energy beaches. He did one high bluff project near Semiahmoo in Whatcom County in 2002. It was a cobble and anchor log control approach. While it protected the toe, it had to be repaired at least a few times in the last five years.

- In terms of soft protection proposals involving beach nourishment, these have impacts on the beach. In order to construct a berm, the beach profile is changed. There is disturbance of the beach that can result in turbidity and there is covering of the existing organisms in the intertidal. While these are temporary, they are impacts.

- While there has been some success at low energy sites, I don't know of any soft bank protection projects in high-energy areas that have been successful in the long term at a reasonable cost for individual homeowner projects.

Report, April 8, 2008, Mark G. Pedersen, Kitsap County Hearing Examiner, Case No. 07-45866.

The OSF requests the justification for the prohibitions on armoring in the Natural shoreline environment found at p.7-30 of the SMP Draft. In addition, there is no need to require a conditional use permit for these facilities in the other shoreline environments, particularly the Shoreline Residential and High Intensity environments. There is also a conflict. The proposed use regulations prohibit shoreline armory to "protect new residential developments." However, the SMP allows such devices under the exemptions, including new development. In this regard, the SMA provides that the construction of a "normal protective bulkhead common to single family

residences" is not considered a substantial development but exempt. RCW 90.58.030(3)(e)(ii). *See also* Draft SMP, pp.9-2, 9-3. Some thought could be given to allowance of "hybrid" structures, which is a compromise approach.

The SMA requires each local master program to protect "single family residences and appurtenant structures against damage or loss due to shoreline erosion." The provisions of any SMP ". . . *shall* provide for methods which achieve *effective and timely* protection against loss or damage to single family residences and appurtenant structures due to shoreline erosion." RCW 90.58.100 (6) (emphasis added), especially structures built before 1991. Where are such provisions in the proposed draft? It appears to the OSF that supportive language to protect older homes is missing.

As an exempt development, a proposed protective bulkhead must be approved if it complies with provisions in the County's Shoreline Master Program ("SMP"). RCW 98.58.140(1); *see also, Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 697-98, 169 P.3d 14 (2007). This is a mandatory provision. *Id. See also Advocates For Responsible Development v. Johannessen and Mason County*, SHB No. 05-014 at *9 (2005), citing RCW 90.58.030(3)(e)(ii) and WAC 173-27-040(2)(c). As the Supreme Court stated in the *Biggers* case:

> The SMA also recognized there is an important function performed by structures that protect shorelines. The legislature's 1992 amendments to the SMA further emphasized this need for certain shoreline structures to provide for the protection of shorelines. This conclusion is illustrated by the SMA's provisions requiring prompt adoption of SMP's provisions requiring prompt adoption of SMPs and shoreline structure permit processing.
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> The SMA contains an express "preference" for issuing such permits. RCW 90.58.100(6). Thus, the SMA also requires that all SMPs contain methods to achieve "effective" and "timely" protection for shoreline landowners. *Id.* SMPs must provide for "the issuance of methods such as construction of bulkheads . . . ." *Id.* Permit application to local governments must be processed in a timely manner. See *id.*
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> The desirability of some shoreline structures is further evidenced by the requirement that SMPs include exemptions from permitting requirements for certain structures. *See* RCW 90.58.030(3)(e). Activities exempted from the "substantial development" permit requirement include the installation of a protective bulkhead for a single family home, maintenance and repair of existing structures, and construction that is necessary for agricultural activities. *See* RCW 90.58.030(3)(e)(i)-(iv).

162 Wn.2d 697-698.

The regulations for existing structural armoring are over preclusive and would not survive legal challenge, in the opinion of the OSF. These regulations start at p.7-30 of the Draft. The proposed regulations state that existing structural shoreline armory may be "replaced in kind if there is a demonstrated need to protect public transportation infrastructure, essential public facilities, and primary structures from erosions caused by currents, tidal action, or waves." Other requirements apply, including that the replacement structure be designed, located, sized and constructed to assure no net loss of ecological functions. These provisions conflict with the SMA requirements for repair and maintenance of existing structures, which is exempt from SMA regulation in terms of a shoreline substantial development approval. They are not consistent with the State Guidelines. WAC 173-26-231(3)(a)(iii)(c). Nor are they internally consistent with the exemptions found in the Draft at page 9-2.

It is noted that the Draft also seeks to prohibit use of a bulkhead revetment or similar shoreline armoring to protect a platted lot where no primary use or structure presently exists. In other words, Staff proposes that a property owner in Jefferson County cannot protect land, only a structure. If the County is asserting that there are public benefits to allow land to erode to the point of nothing, then this language effectuates a regulatory taking. It is also inconsistent with Comprehensive Plan policies for legal lots of record.

Additional significant policy choices are made by Staff in the Draft in terms of the proposed regulations for new or expanded shoreline armoring. Structural shoreline armoring is absolutely prohibited on all lakes in Jefferson County and "other low energy environments such as bays, in accreting marine shores." The OSF questions this preclusive approach without demonstration that other techniques will be adequate to protect land and property. In the record submitted to date, such a showing is not made. Further, residential bulkheads are exempt and allowed.

New structural shoreline armoring is permitted only to protect a lawfully established primary structure, such as a residence, that is in "imminent danger of loss or substantial damage from erosion caused by tidal action, currents, or waves." The regulatory standard in the SMA does not have such preclusive language, allowing "normal protective bulkheads" common to single-family residences. It is not common to wait to protect a home or property until the risk is "imminent."[7] The State Guidelines use the terms "significant possibility of damage." WAC 173-26-23(3)(a)(iii)(D), and defer to a geotechnical engineer to make the call.

[7] The common legal dictionary definition of "imminent" is "near at hand; mediate rather than immediate; impending; threatening; or perilous." BLACK'S LAW DICTIONARY 676 (5th ed. 1979). The common non-legal definition is similar: "about to occur, impending." AMERICAN HERITAGE COLLEGE DICTIONARY 679 (3d ed. 1993). There is nothing in the definitions that suggests that "imminent" means "within a certain time frame." Indeed, something that is imminent could be about to happen within seconds or even years. For example, the City of Seattle recognized that "global warming represents a clear and increasingly imminent danger to the economic and environmental health of the world, and to specific qualities of life for the Seattle area. . . ." *See Okeson v. City of Seattle*, 159 Wn.2d 436, 440, 150 P.3d 556 (2007) (in reference to a City ordinance mitigating effects of greenhouse

In the experience of this commentator, the definition of "imminent danger" is very subjective. This commentator has seen standards requiring that the bank recede to the point of only five or ten feet from the primary structure before the subjective "imminent danger of loss" standard is considered met. The problem with this analysis, as geotechnical engineers will support, is that loss of a bank or slope is episodic. In Puget Sound or the Straits of Juan de Fuca, an existing bank can slab off in portions of more than five or ten feet. Property owners should not be left in a winter storm at 3:00 a.m. wondering if the next failure event is going to happen, and the last ten or fifteen feet of the bank breaks off with their home left overhanging the bank, or, worse, sliding down to the beach or into Puget Sound or the Straits of Juan de Fuca. The best approach is simply to stay with the language in the SMA for exemptions. If not, the subjective "imminent danger of loss" language needs redrafting, if not outright elimination.

What the OSF recommends is that the need for a bulkhead be put in the hands of the professionals, the geotechnical engineers. The County should mandate commission of a geotechnical report demonstrating danger to existing structures or properties. With such a report, the County should then routinely process and approve shoreline exemptions for bulkheads (with adequate mitigation), including provisions for the location of the bulkhead at or near the ordinary high water mark.

The OSF totally opposes the draft language that a "hard" bulkhead is not allowed without showing that other alternatives are "infeasible or insufficient." The Comprehensive Plan at most establishes a preference for non-structural methods. Plan, p. 8-24. Those terms have been interpreted by some jurisdictions as a mandatory requirement that other techniques first be utilized, then demonstrated to fail, before a hard protective bulkhead is allowed. This is a dangerous and expensive approach. A better approach is to encourage hybrid structures and defer to a site specific report if it justifies the need for a new structural bulkhead. In this regard, the Draft SMP requires extremely detailed information from an applicant. *See* pp.10-3, 10-4.

The standard found on p.7-32 of the Draft, that the County shall require applicants for new or expanded shoreline structural armoring to "provide credible evidence of erosion" as the basis for documenting that the primary structure is in imminent danger from shoreline erosion caused by tidal action, currents or waves" is disrespectful and vague. A geotechnical report in Washington State must be stamped by a licensed and registered professional engineer. There is no basis for Staff to second guess these technical reports as to their "credibility." To the OSF's knowledge, there is no expertise within the Department of Planning and Community Development of such depth to allow Staff to determine for themselves what is deemed "credible." This is extreme micro-management.

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gas emissions). If global warming presents imminent danger, a rapidly retreating shoreline does as well. Thus, the term "imminent" more appropriately describes something "certain to happen," and the damage to the Strand Property is certain to happen. *See, e.g., Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995) (finding that some actions may constitute a taking because they pose high risks of *certain or imminent* injury).

The requirement found at p.7-32 that the new or expanded shoreline armoring be designed according to applicable U.S. Army Corps of Engineers' requirements and/or State Department of Fish and Wildlife aquatic habitat guidelines is over kill. For one, the U.S. Army Corps of Engineers' requirements are for large breakwaters and jetties, not residential bulkheads. Two, the WDFW guidelines are just that – guidelines – which do not have the force and effect of law. The better approach is to simply require the State licensed professional geotechnical engineer to consider and consult these guidelines where applicable.

Article 8. Use Specific Policies and Regulations

The OSF has significant concerns with Article 8, starting with the agricultural use policies. The OSF notes that Staff urges that "new" agricultural use and development should preserve and maintain native vegetation between tilled lands and adjacent water bodies. According to Staff, the width of the native vegetation zone "should vary depending on site conditions with the overall goal being to limit clearing or repairing corridors." The OSF repeats its concerns with generic set asides and buffers, and questions why new agricultural activity should be prohibited in the Natural Shoreline environment. *See* Draft, p.8-2. RCW 90.58.065 provides that existing agricultural uses on agricultural land cannot be restricted. "New agricultural activity" is vague enough that it could include rotation of crops, which we trust is not the intent.

Going on with my comments on agricultural use, the Draft, at p.8-2 under subheading C (Regulations), imposes essentially the same buffer as set out for all other uses. This language conflicts with the policy set out above for "variable" buffers. The requirement that new agriculture conform to the 150-foot buffer standards in Article 6 will inhibit the achievement of the widely held community values of sustainability and local food production. It also does not follow the directive of Policy 1.A.7.; "Existing and new agricultural practices are encouraged to use best management practices to prevent erosion, runoff, and associated water quality impacts." Currently, Jefferson County uses BMP's to mitigate the adverse impacts of existing agriculture, achieving improved water quality with smaller, smarter buffers. There is no reason this approach cannot also work for the new agricultural practices.

The Vision Statement in the County Comprehensive Plan describes a "healthy, diversified, and sustainable local and regional economy … which is compatible with and complementary to the community." Another principle encourages "a degree of flexibility and autonomy for local communities to address their own unique needs." Fostering local agriculture is a significant community value in Jefferson County. Residents are encouraged to support the Farmers Market and in turn local farmers. In the section of the Vision Statement entitled "The Comprehensive Plan and Our vision," there follows, "The Comprehensive Plan which follows is a statement about the future. We, the Board Commissioners, in adopting this Plan, are projecting a future in which the essence of the rural nature of Jefferson County is retained, while accommodating new growth and development in traditional community setting and specific designated areas."

There is nothing more essential in retaining the traditional rural essence of Jefferson County than its history of agriculture. New agriculture is the future. The restrictions on new agriculture in the Draft SMP run counter to Jefferson County's community goals as envisioned through its comprehensive planning process.

Turning to the specific use regulations for commercial uses, which start at p.8-8 of the Draft, these are overly broad – particularly for the High Intensity shoreline environment – and conflict with Comprehensive Plan policies. There is no necessity to apply a policy that commercial development "should be located, designed and operated to avoid or minimize adverse impacts on shoreline ecological functions and processes." For the highly built environment within Jefferson County's urban areas, relocation is not a viable choice in most instances.

The OSF does not understand the approach to try to set priorities, mandating that water-related commercial uses should not displace existing water-dependent uses, and water enjoyment commercial uses should not displace existing water-related or existing water-dependent uses. So long as the proposed commercial use relies upon the water for its viability or utility, these choices should be reserved to individual property owners. The OSF sees no way to require under the SMA that commercial development "should be visibly compatible with adjacent non-commercial properties." The SMA is not a design review process, nor is the Shoreline Hearings Board a Design Review Commission. This language should be stricken.

The proposed environmental regulations essentially prohibit any meaningful commercial use in the Priority Aquatic, Aquatic, and Natural Shoreline environments. In the Conservancy environment, non water-dependant and non water-related commercial uses/developments are prohibited, except for very small scale low intensity recreational/tourist development uses which may be allowed with a conditional use permit. In the other shoreline environments, only water-oriented use and development is permitted; non water-oriented commercial uses are only allowed as a conditional use. In the opinion of the OSF, these requirements are overly restrictive and inconsistent with the Comprehensive Plan. Washington State is facing significant economic challenges. This is not the time to enact new regulations making it more difficult to open businesses which can create family wage jobs. In lieu of prohibitions, the OSF urges allowance of commercial uses with careful environmental analysis and study.

Turning to the specific use regulations for water-oriented use/development, the OSF does not believe that the County has authority to mandate that on parcels where existing water oriented commercial uses are located, "any undeveloped and substantially unaltered portion of the waterfront not devoted to water dependent use shall be preserved." Draft, p .8-10. This also conflicts with Comprehensive Plan polices for legal lots of record.

There are a myriad of problems with the regulations for non water-oriented use/ development under the heading "Commercial Uses." For one, the OSF does not believe that at least in the High Intensity shoreline environment, non water-oriented commercial uses can be

outright prohibited, unless the property owner is essentially "held up" by having to provide a "significant public benefit in the form of public access and/or ecological restoration." The OSF also believes that the requirement for a mixed use development, that 80% of the shoreline buffer area be restored to provide shoreline ecological functions and processes, is not legally supportable.

The Draft, at p.8-11, states that the County can require an "alternative design" for the "optional mixture of uses and activities." This makes no sense. A property owner or developer should be able to choose what is considered optimal, without having to second guess themselves by a second alternatives analysis. This requirement is unduly onerous, and should be eliminated.

Addressing the Forest Practice specific use policies and regulations, the OSF questions whether the County has authority under the Forest Practices Act to impose a 30% limit on the harvest of merchantable timber over any ten-year period in the natural and conservancy shoreline designations. The OSF does not believe that the County can require a conditional use permit for forest practices in the Shoreline Residential and High Intensity environments then they exceed the 30% limit in any ten-year period standard.

The specific use regulations for industrial and port development have a number of problems. Starting with policy No. 3, the OSF does not believe that the County has authority to require that industrial and port development "should be visibly compatible with adjacent non-commercial properties." This standard is impractical and probably impossible to meet. In addition, what is considered "visibly compatible" is vague. Under the specific use regulations, industrial and port development is prohibited in the Priority Aquatic, Aquatic and Natural environments. This may be overly restrictive. In the other environments, such use is allowed as a conditional use. For these types of development, the OSF agrees that a conditional use approval is the appropriate approach, in lieu of a shoreline substantial development permit. However, the OSF does not understand why uses and development that are not water-dependent or water-related are prohibited, if they occur in conjunction with an industrial or port development. In particular, there may be industrial uses that are not water-dependent *per se*, but must be located in close proximity to the water either to send or receive product and materials.

Turning to the specific use policies for regulation, the OSF commends Jefferson County for recognizing that public recreation and public lands is a preferred use of the shoreline. However, under the case law, private recreation facilities are also deemed to be of priority and given preference under the SMA. At this time the State of Washington is closing a number of State parks. To fill this void, the County should consider policies which strongly encourage the promotion and development of private recreational uses, as these facilities will take pressure off of those remaining public parks and public access areas which remain open.

In terms of the specific use regulations, the OSF does not understand the prohibition on non water-oriented recreation in the Natural Shoreline environment. This could be preclusive enough to even outlaw a small picnic area or use. There is absolutely no basis to prohibit non

water-oriented recreation in the Shoreline Residential and High Intensity environments. For one, the line between non water-oriented and water-oriented recreation is not always clear. Two, recreation is recreation, and it is a priority use under the SMA.

Addressing the residential use policies, the OSF disagrees that residential use is not a water-dependent, only a preferred use of the shorelines. The Draft does not consider residential use a preferred use unless it is "planned and carried out in a manner that protects shoreline functions and processes to be consistent with the no net loss provisions" of the SMP. Essentially, this approach makes single-family residential use a regulated use, when it is exempt from SMA permitting requirements. Under the Staff's approach, any new shoreline construction by the owner of a shoreline lot for his or her own use would have to demonstrate that the proposed home "protects" shoreline functions and values. There is no such requirement in the SMA.

In addition, it appears Staff believes that they can require that residential use and development be "properly managed to avoid and prevent cumulative impacts associated with shoreline armoring, over water structures, shoreline runoff, septic systems introduction of pollutants, and vegetation clearing." Once again, this simply takes exempt activity and essentially makes it subject to SMA permitting requirements under the guise of "administering" shoreline exemptions. As set out above, the Shoreline Hearings Board rejected this approach when invalidating the SMA Rules.

The OSF does not believe that Jefferson County can require a conditional use permit for construction of a single-family residential home in the Natural shoreline environment. This provision conflicts with the SMA sections which exempt such development. In this regard, the OSF believes that "exempt is exempt." Thus, the general prohibition on single-family residential development by a lot owner unless approved as a conditional use in the Conservancy designation is illegal.

Turning in more detail to the regulations for primary residences found in the Draft starting at p.8-27, the OSF can find no language in the SMA giving the County authority to prohibit residential development under circumstances where it can "be reasonably expected to require structural shoreline armoring during the useful life of the structure or one hundred (100) years, whichever is greater." This language should be stricken.

Article 9. Permit Criteria and Exemptions.

The OSF has significant concerns with the County's approach and the Draft SMP treatment of exemptions from Shoreline substantial development permits but these have largely been set out above in its detailed comments. The major point is that under the SMA, the County cannot require that an exempt facility be "consistent with the policies **and** provisions of this program." The provisions of the SMP include use regulations. By applying the use regulations, Jefferson County impermissibly turns an application for an exemption into a permit.

The OSF has concerns with the exemption for residential bulkheads. In the Draft, page 9.2, it stipulates that if a bulkhead is deteriorated such that "an ordinary high water mark has been established by the presence and action of water landward of the bulkhead, then the replacement bulkhead must be located at or near the actual ordinary high water mark." In practice, this commentator has seen this type of standard applied under circumstances where a bulkhead immediately fails. It is inappropriate to have a bulkhead fail, then have regulators take the position that the "New" ordinary high watermark is much further up the beach.

The OSF agrees that when the County issues a building permit, there is no need for a statement of exemption for a single family residence. However, this may not mean much, since a written exemption is required for any "clearing and ground disturbing activities." (Draft, p. 9-6)

The OSF has significant concerns as to the Variance Permit criteria. For one, no allowance for variation or change of use is allowed. (Draft, pg 9-7) Two, any alteration or expansion of non-conforming structures, including single family residential homes, is handled under the variance procedure. For exempt facilities such as single family homes, alterations should be allowed. Third, reasonable use exceptions are handled as variances. This is inappropriate. This approach will simply expose the County to regulatory taking claims, since the variance criteria are so strict. The County must enact in the SMP a standalone provision for issuance of reasonable use exceptions.

Article 10. Administration and Enforcement

The OSF notes that the minimum permit application requirements set out in pp. 10-3, 10-4 of the Draft, are extremely onerous. In particular, it would be expensive for applicants to provide information as to existing land use contours and intervals "sufficient to accurately determine the existing character of the property." In addition, provision of a description of the "existing ecological functions and processes effecting, maintaining, or influencing the shoreline at/near the project site" will be expensive. It is respectfully submitted that the Planning Commission should work with staff to come up with application requirements that differ between a major and minor proposal.

The OSF is very concerned with Section 10.8, which places the burden of proof on the applicant throughout. This means the onus is placed on the applicant to determine what environmental designation their property is to be regulated under, a complex and expensive site-specific scientific judgment process, all for the privilege of finding out what uses are or are not allowed.

Turning to non-conforming development and uses, this is a key provision, since under the draft proposal, essentially all of the built shoreline environment in Jefferson County will be turned into a non-conforming development if the 150 foot marine buffers and vegetation set asides are adopted.

It is noted that non-conforming structures, "other than non-conforming single family residences," cannot be expanded or enlarged without obtaining a variance, or be brought into conformance with the new requirements. These provisions do not provide as much protection to existing single family homes as might be thought. For one, the Draft requires conditional use permits for single family homes in a number of the shoreline environments. In such case, the existing residences are required to be brought up to the new requirements. Where enlargements, expansions or additions are allowed to existing single family homes, they cannot extend water-ward of the "existing residential foundation walls." (Draft, 10-8) In addition, the alterations or additions cannot "adversely affect critical areas." If the new buffers are imposed, these will likely be deemed critical areas, thereby precluding any expansion or alteration of any existing single family homes. This section requires a substantial amount of work in my opinion.

The Comprehensive Plan has a goal, LNG 8.0, to "support the continued existence and economic viability of legally established land uses which become nonconforming…." Plan, p. 3-54. Existing commercial and industrial uses "should be allowed to expand or be replaced…." Policy LNP 8.3, Plan, p. 3-54. The Draft SMP violates these provisions. Policy LNP 8.9 allows replacement of a destroyed non-conforming structure, but the Draft SMP does not, imposing a "75% limit." Once again, there is an inconsistency.

Thank you for your kind attention to these comments and the enclosures.

Very truly yours,

DENNIS D. REYNOLDS LAW OFFICE

Dennis D. Reynolds

Attachments

cc: Jim Hagen (OSF)

DDR/cr